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THE LAW
RELATING TO
ADVERTISEMENTS



THE LAW
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ADVERTISEMENTS

BY
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OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW;
CHESTER AND NORTH WALES CIRCUIT

LONDON
BUTTERWORTH & CO., 11 & 12, BELL YARD, TEMPLE BAR
Law Publishers
1906

275, 32

1915

PRINTED BY
WILLIAM CLOWES AND SONS, LIMITED,
LONDON AND BECCLES.

325-46
G. 6-10

P R E F A C E

THE part played by modern advertising in the development of national and international trade is a sufficient reason for the appearance of a book, however imperfect it may be, dealing with the law relating to advertisements. Somewhat hurriedly compiled during odd intervals of practice, the volume gives an outline of the salient facts in the decided cases, which may be found useful by the legal practitioner. The chapters dealing with copyright and Trade Marks are necessarily meagre. The absence of any work on the subject of advertisements in our law libraries is the only claim which the author ventures to make on behalf of this little volume.

T. A. J.

5, PUMP COURT, TEMPLE,
April, 1906.



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E R R A T A .

- Page 11, line 11, *read* "failed" *for* "parted."
- „ 36, „ 18, *read* "curiam" *for* "currain."
- „ 87, lines 18, 20, 21, *read* "subsection" *for* "section."
- „ 135, footnote, *read* "Palace" *for* "Pabel."
- „ 140, line 3, *read* "reviewed" *for* "renewed."
- „ 155, „ 3, *read* "Where" *for* "And."
- „ 156, „ 5, *read* "contrary" *for* "contracting."

THE LAW

RELATING TO

ADVERTISEMENTS

CHAPTER I

CONTRACTS FORMED THROUGH ADVERTISEMENTS

A LONG series of decisions has established the principle that contracts may be formed through advertisements; for a definite offer published to the world becomes a binding contract as soon as a person comes forward and acts upon it. The dicta laid down by some judges in the cases are, however, seriously questioned by leading authorities, one of whom¹ has committed himself to the opinion that the modern doctrine of acceptance by conduct has been carried to the utmost limit warranted by sound principle, and is not likely to be extended. The tendency of the courts in the more recent cases has been in this direction. That is to say, greater heed has been paid by the judges to the fundamental distinction between the proposal of a contract and the mere preliminaries or declared willingness of the advertiser to do business. The border-line which separates the one from the other is shadowy. For example, the time-table of a railway company has been construed into a contract as soon as a person acts upon

¹ Pollock's "Contracts" (7th ed.), p. 19.

it.¹ But an auctioneer's advertisement of a sale by auction, which was fixed for a certain date, has been held to be no contract with any one who comes forward and acts upon it.² The application of the doctrine of acceptance by conduct to different sets of circumstances is beset with difficulties, as the cases cited hereafter show. In *Denton v. Great Northern Railway*, one of the judges, Crompton, J., entertained some doubt as to how far the liability of a railway company, sued for breach of contract formed through a time-table, rested on contract. Moreover, in another case³ the doctrine of tacit acceptance was carried to a length which has been repudiated both by Sir William Anson and Sir Frederick Pollock.⁴ The former authority cites an instance which illustrates the difficulty of applying an obligation *quasi ex contractu* to different circumstances. Suppose a bookseller publishes a catalogue with prices stated against the titles of the books. If he receives by the same post five or six letters asking for a particular book, does his catalogue bind him in contract? Then to whom is he bound? To the man who first posted his letter? If so, how is this to be ascertained?

In the earliest case of this kind on record (*Weeks v. Tybald*⁵) a general offer by A in B's hearing, to give £100 to the person who married A's daughter, was held to be no contract with B, who acted upon it. One of the latest cases of the same kind, *Farina v. Fickus*,⁶ was decided on analogous lines. In the interval, however, an unbroken succession of cases has established the doctrine that a contract arises as soon as a person performs the

¹ *Denton v. Great Northern Railway*, 5 E. & B. 861.

² *Harris v. Nickerson*, 8 Q. B. 287.

³ *Gibbons v. Proctor*, 64 L. T. 594.

⁴ 23 (10th ed.); 22 (7th ed.)

⁵ Noy, 11.

⁶ 1900, 1 Ch. 331.

conditions mentioned in the advertisement. Nearly all the cases that touch the border-line turn on the same point, namely, whether there is an offer. An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.¹ The most familiar illustrations of this proposition are (a) the class of cases where rewards to the public for some service or information have been advertised; and (b) the class of cases, where the time-tables of railway companies have been held to amount to binding promises. The absence of privity between the contracting parties has occasioned a good deal of discussion among the authorities. One of the earliest cases in class (a) was *Williams v. Carwardine*,² where a woman, under the impression that she was going to die, gave information which led to the arrest of a murderer, and for which a reward had been offered. Unfortunately, the existing report is silent on the material point whether the woman knew that a reward had been offered at the time she gave the information. The case is an authority for saying, as Anson points out, not that knowledge of the offer is immaterial, but that the motive of compliance with the request or offer is immaterial. It has been held in the American courts that knowledge of the offer is material,³ and, moreover, the only English case which has decided that knowledge of the offer is immaterial,⁴ has been rejected by Pollock and Anson as a binding authority.

The rule laid down⁵ for the determination of these cases is: Is there an offer? And to constitute an offer, the words used, however general, must be capable of application to specific persons, and must be distinguishable

¹ Anson, 44.

² *Fitch v. Snedaker*, 38 N. Y. 248.

³ *Gibbons v. Proctor*, 64 L. T. 594.

⁴ 4 B. & Ad. 621.

⁵ Anson, 49.

from invitations to do business, and from advertisement or puffery, which does not contemplate legal relations. The application of this rule was discussed at length by the Court of Appeal in the case of *Carlile v. Carbolic Smoke Ball Co.*,¹ which may properly be cited as the leading case on this subject. The salient facts in the case may be briefly put: Defendants were the proprietors of a medical preparation called "the Carbolic Smoke Ball." They issued an advertisement, in which they offered to pay £100 to any person who contracted the influenza after having used one of their smoke-balls in a specified manner and for a specified period. It added: "£1000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter." C., on the faith of the advertisement, bought one of the balls and used it in the manner and for the period specified, but nevertheless contracted the influenza. Held, affirming the decision of Hawkins, J., that the above facts established a contract by the defendants to pay £100 in the event which had happened; that such contract was neither a contract by way of wagering, within 8 & 9 Vict. c. 109, nor a policy within 14 Geo. III., c. 48, s. 2, and the plaintiff was entitled to recover.

Per Lindley, L.J.: "We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: '£1000 is deposited with the Alliance Bank, showing our sincerity in the matter.' Now, for what was that money deposited, or that statement made, except to negative the suggestion that this was a mere puff and meant nothing at all? . . . Then it is contended it is not binding. In the first place, it is said that it is not made

¹ 1893, 1 Q. B. 257.

with anybody in particular. Now, that point is common to the words of this advertisement, and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the conditions accepts the offer. In point of law, this advertisement is an offer to pay £100 to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is *Williams v. Curwardine*, which has been followed by many other decisions upon advertisements offering rewards. . . . The true view in a case of this kind is that the person who makes the offer shows by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance. . . . It has been argued that this is *nudum pactum*—that there is no consideration. We must apply to the argument the usual legal tests. Let us see whether there is no advantage to the defendants. . . . It is quite obvious that in the view of the advertisers a use by the public of this remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore the advertisers get out of the use an advantage which is enough to constitute consideration.”

Per Bowen, L.J.: “We were asked to say that this advertisement was a contract too vague to be enforced. The document itself is not a contract at all, it is only an offer made to the public. . . . It is also contended that the advertisement is rather in the nature of a puff or a proclamation than a promise or offer intended to mature into a contract when accepted. . . . Was it

intended that the £100 should, if the conditions were fulfilled, be paid? The advertisement says that £1000 is lodged at the bank for the purpose. Therefore it cannot be said that the statement that £100 would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon. . . . It was also said that the contract is made with all the world—that is with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition; and although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer, as I think some learned judge in one of the cases has said. If this is an offer to be bound, it is a contract the moment the person fulfils the condition. That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century; and it cannot be put better than in Willes, J.'s judgment in *Spencer v. Harding*:¹ 'In the advertisement cases,' he says, 'there never was any

¹ 5 C. P. 561, 563.

doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who, before the offer should be retracted, should happen to be the person who fulfilled the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, "and we undertake to sell to the highest bidder," the reward cases would have applied, and there would have been a good contract in respect of the persons.' As soon as the highest bidder presented himself, says Willes, J., the person who was to hold the *vinculum juris* on the other side of the contract was ascertained, and it became settled. Then it was said that there was no notification of the acceptance of the contract. . . . As notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person, in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance. . . . If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note, saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as

soon as they find the dog they have performed the condition. . . .”

Per A. L. Smith, L.J.: “. . . It was said there was no person named in the advertisement with whom any contract was made. That, I suppose, has taken place in every case in which actions on advertisements have been maintained from the time of *Williams v. Carwardine*,¹ and before that down to the present day. I have nothing to add to what has been said on that subject, except that a person becomes a *persona designata* and able to sue when he performs the conditions mentioned in the advertisement.”

Expressions of Intention form no Contract.—C.² filled up a form issued by F., an insurance company, with statements as to his condition of health and other matters. C. at the same time made a proposal for an insurance on his life, declaring that the statements in the form were true, and to be taken as the bases of the contract. F. accepted this proposal, but upon the terms that no insurance should take effect till the premium was paid. Before tender of the premium C. had an accident, which materially altered the state of his health. F. then refused to accept the premium or to issue a policy. Held, that the nature of the risk having been altered at the time of the tender of the premium, there was no contract binding the company to issue a policy. *Quare*, whether if there had been no alteration in the risk the company would have been legally entitled to refuse to accept the premium and to issue a policy. Lord Esher: “All these statements which are made preliminary to the moment of insurance

¹ 4 B. & Ad. 621.

² *Canning v. Farquhar*, 16 Q. B. D. 727.

are not considered by either party as contractual statements, but as expressions of intention on the one side to insure, on the other to accept the risk. That seems to me to be the view at which we must arrive, looking at this as a business transaction. Now, there is no case that supports affirmatively this view, but it is supported negatively by the fact that during all the years that life insurance has been known and practised, there is no case in the books, or known to any one, in which an action such as this has been maintained. These considerations are conclusive, to my mind, that what was said was preliminary to the contract or insurance, and was never intended by either party to be a contract in itself." Lord Lindley asked what was the effect of the negotiations at the moment when the office communicated to C. that his proposal had been accepted subject to payment of a certain premium? "It was urged on the part of C. that there was then a complete contract binding the office on payment or tender of the premium, to issue a policy of insurance. It is true that there had been an acceptance of C.'s offer, but he had not at this time assented to the company's terms; and until he had assented to them there was no contract binding the company. The company's acceptance of C.'s offer was not a contract, but a counter-offer. . . . There was no contract before the tender, and, the risk being changed, the company's offer could not fairly be regarded as a continuing offer, which C. was entitled to accept. His tender was in truth a new offer for a new risk which the company were at liberty to decline."

Offer may be withdrawn before Acceptance.—W.¹ was

¹ Wallace's case, *In re Metropolitan Fire Insurance Co.*, 1900, 2 Ch. 671.

a shareholder in a company C. By a reconstruction agreement the C. company and its liquidators transferred its good will and assets to the M. company, part of the consideration for the transfer being that every member of the C. company should, in respect of each share therein held by him, "be entitled as of right to claim an allotment of either a debenture bond or two ordinary shares in the M. company." Claims had to be made in writing to the M. company or to the liquidators of the C. company, the latter of whom were to notify each member of the C. company in writing the number of shares to which he was entitled. The liquidators duly gave notice to W., who addressed a claim to the M. company for ten ordinary shares, agreeing to accept the same and to pay the further moneys payable thereon when called upon. Before any acceptance of the offer or the allotment of shares subsequently made, W. wrote to the M. company withdrawing his application. In the subsequent winding-up of the M. company the liquidator of that company sought to have W. retained on the list of contributories. Held, that the document sent to W. was an application which could be withdrawn by him before acceptance and not on acceptance of a prior offer by the M. company, and that he was not liable as a contributory.

Advertisement must contain Privity of Contract.—B.,¹ a company promoter, formed a company with 96,000 shares of £1, of which 12,000 were to be appropriated to the public at 12s. 6d. per share, free from further calls B., in offering the 12,000 shares to the public, guaranteed and promised to the bearers of these shares a minimum

¹ *Gerhard v. Bates*, 2 E. & B. 477.

annual dividend of 33 per cent., payable at specified times. G., confiding in the promise, *became purchaser and bearer* of 2500 of the 12,000 shares at 12s. 6d. B. did not pay any dividends, and in an action brought against him by G., the Court held that it did not lie, as "neither privity of contract nor consideration appeared." (On a second count G. was entitled to recover against B. as for a tort on the ground of fraud.) *Per* Bowen, L.J. (discussing the decision in the *Carbolic Smoke Ball* case): "In *Gerhard v. Bates*, which arose upon demurrer, the point upon which the action parted was that the plaintiff did not allege that the promise was made to the class of which alone the plaintiff was a member, and that therefore there was no privity between the plaintiff and the defendant."

Advertisement of Auction Sale not a Contract unless announced as "without Reserve."—N.,¹ an auctioneer, advertised in the London papers that certain brewing materials, plant, and office furniture would be sold by him at Bury St. Edmunds, on a certain day and two following days. H., a commission broker in London, having a commission to buy the office furniture, went down to the sale; on the third day, on which the furniture was advertised for sale, all the lots of furniture were withdrawn. Upon which the plaintiff brought an action against the defendant to recover for his loss of time and expenses. Held, that H. could not maintain the action, since the advertisement of the sale was a mere declaration, and did not amount to a contract with any one who might act upon it, nor to a warranty that all the articles advertised would be put up for sale. Blackburn, J.: "(To say that) the advertisement amounted to a contract by the

¹ *Harris v. Nickerson*, 8 Q. B. 287.

defendant with anybody that should act upon it, that all the things advertised would be put up for sale, . . . is a startling proposition, and would be excessively inconvenient if carried out. It amounts to saying that any one who advertises a sale by publishing an advertisement becomes responsible to everybody who attends the sale for his cab hire or travelling expenses." Quain, J. : "When a sale is advertised as without reserve, and a lot is put up and bid for, there is ground for saying, as was said in *Warlow v. Harrison*, that a contract is entered into between the auctioneer and the best *bonâ fide* bidder; but that has no application to the present case. Here the lots were never put up, and no offer was made by the plaintiff nor promise made by the defendant, except by his advertisement that certain goods would be sold. It is impossible to say that that is a contract with everybody attending the sale, and that the auctioneer is to be liable for their expenses if any single article is withdrawn."

H.,¹ an auctioneer, advertised that he would sell by auction, "The property of a gentleman, without reserve—Janet Pride." W. attended the sale, and became the highest bidder. The owner of the horse then bid higher, whereupon W., finding that the last bidder was the owner, refused to make a further bid, and H. knocked down the mare to its owner; but it did not appear that H. knew the last bidder was the owner. Held, that H. was liable to W. for having undertaken to sell the horse without reserve, and had not done so. Martin, B., dealing with auction sales "without reserve," laid down: "The highest *bonâ fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve."

¹ *Warlow v. Harrison*, 1 E. & E. 295.

Attempt to ascertain whether an Offer can be obtained is not enough to form a Contract.—H.¹ sent out a circular as follows: "We are instructed to offer to the wholesale trade for sale by tender the stock-in-trade of A., amounting, etc., and which will be sold at a discount in one lot; payment to be made in cash; the tenders will be received and opened at our offices," etc. Held, that this did not amount to a contract or promise to sell to the person who made the highest tender. Willes, J.: ". . . Reliance is placed on the cases as to rewards offered for the discovery of an offender. In those cases, however, there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who, before the offer should be retracted, should happen to be the person to fulfil the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. The question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods and to receive offers for the purchase of them. . . . It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt."

General Words do not amount to a Contract.—In *Weeks v. Tybald*,² defendant discussed with plaintiff's father the desirability of a marriage between his daughter

¹ *Spencer v. Harding*, 5 C. P. 563.

² *Noy*, 11.

and the plaintiff. He "affirmed and published" that he would give £100 to the person who married his daughter with his consent, and invited plaintiff to his house to woo the girl. Plaintiff married the girl, and sued defendant for the £100 he had promised. The Court held that the action did not lie, for "affirmed and published" did not "make words that include a promise." "It is not averr'd nor declar'd to whom the words were spoken, and it is not reason that the defendant should be bound by such general words spoken to excite suitors."

In 1873 P.,¹ a father, prior to the marriage of his daughter, wrote to F., the intended husband: "You are of course, aware that with my large family Eliza will have little fortune. She will have a share of what I leave after the death of her mother, whom I wish to leave in comfortable independence if I should leave her a widow." F. accepted the letter as giving him some rights, and the marriage took place. P. afterwards acquired a large fortune, his wife having predeceased him. By his will he left a legacy of £2000 to the daughter, and gave the residue of his estate equally between six of his other seven children. F. and his wife claimed by virtue of the letter to be entitled to an equal eighth share of the father's estate. Held, (1) that the letter did not constitute a contract by P., but was merely an expression of his intentions; (2) that if it were a contract, it was an obligation to leave not an equal eighth share, but some portion or share of his estate to the daughter, and was fulfilled by the legacy.

Performance of Conditions in Advertisement amounts to a Contract.—C.² advertised that he would give a reward

¹ *Farina v. Fickus*, 1900, 1 Ch. 331.

² *Williams v. Carwardine*, 4 B. & Ad. 621.

of £20 to any person who should give information leading to the discovery of the murder of C.'s brother. W. appeared to have been at a house with the deceased on the night he was supposed to have been murdered, but, after the inquest, when examined before the magistrates, did not give any information which led to the apprehension of the real offender. The inquest was held on April 13-19; on April 25 C. issued the advertisement. Two persons were tried for the murder, and acquitted. Soon after W. was severely beaten by X, and, believing that she had not long to live, and to ease her conscience, she made a voluntary statement which led to the subsequent conviction of X. It was contended for C. that as W. was not induced by the reward to give evidence, the law would not imply a contract to pay the money. The judge found that W., having given the information which led to the conviction of the murderer, had performed the condition on which the £20 was to become payable. The jury found that W. was not induced by the offer of the reward, but by other motives. Held, on appeal, that W. could recover, though she was influenced by other motives. *Per Littledale, J.*: "The advertisement amounts to a general promise to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information." *Park, J.*: "There was a contract with any person who performed the conditions mentioned in the advertisement."

A¹ gave a letter of credit to B, authorizing him to "draw upon the bank at six months' sight to the extent of £15,000 sterling, and such drafts I undertake duly to honour on presentation. This credit will remain in force

¹ *Ex parte Asiatic Banking Co.*, 2 Ch. A. 391.

for twelve months from this date." C held for value bills drawn on A on the strength of this letter. A stopped payment before the bills were presented for acceptance, and B was indebted to A in an amount exceeding what was due on bills. C claimed to prove, in the winding up of A's affairs, for the amount of the bills, one of the grounds being that "the letter shown to the person advancing money constituted, when money was advanced on the faith of it, a contract by the bank (A) to accept the bills." Cairns, L.J., adopted this view, holding that the letter amounted to a "general invitation," and that the acceptance of the offer in the letter constituted a binding legal contract.

Rendering of Services set out in Advertisement amounts to a Contract.—P.¹ instructed his printers to print handbills, offering a reward of £25 to the person who should give information to X, a police superintendent, leading to the conviction of the perpetrator of a certain crime. G., who was a police officer, before the instructions to print the handbills had been given by P., had communicated the desired information to C., another officer, with instructions to forward it to X. C. thereupon communicated the information, in accordance with the rules of the force, to L. (who was his immediate superior officer). On the same evening L. sent on the information to X, whom it reached in the course of the following morning, after the time when the handbills had been delivered to and had been distributed by him to the neighbouring police-station. Held, that G., the importance of whose information was admitted, was entitled to the reward, the messengers C. and L., through whom such information was

¹ *Gibbons v. Proctor*, 64 L. T. 594.

conveyed to X, being G.'s agents to convey, and not X's agents to receive.

Fulfilment of Advertisement Condition a Question of Fact.—W.,¹ whose shop had been broken into, published a handbill, stating that watches and jewellery described therein had been stolen from his shop, and that a reward would be given to any person who would give such information as should lead to the apprehension and conviction of the thief or thieves. The burglary was committed on February 6; on the 14th, R. brought one of the watches to the shop of T., a watchmaker, who gave information to the tradesman, upon which R. was taken into custody as a receiver. While in custody he told the police that the thieves would be found at a certain house, where two of them were apprehended, and the third subsequently, and the three were convicted of the burglary. At the trial of the action brought by T. for the reward, the police swore that the information given by R. was not the means of the thieves being apprehended, as the police were already watching the shop. The jury found that the thieves were apprehended in consequence of R.'s information. Held, that T.'s information was not too remote from the apprehension and conviction of the thieves, and that it was properly left to the jury whether it led to their apprehension and conviction within the meaning of the handbill.

Offer in Advertisement must be acted upon.—The parents² of a stolen child advertised a reward to the person

¹ *Turne v. Walker*, 8 B. & S. 314.

² *Fallick v. Barber*, 1 M. & S. 108.

who would give information where the child was so that it might be restored to its parents. F. communicated to B. her suspicion where the child was, "in order to put the matter into his hands for his benefit if he chose to run the risk," and the child was afterwards restored to its parents by the exertions of B., who acted upon F.'s communication. Held, that F. could not recover from B., to whom the award had been paid, either the whole or any portion of it.

Reward not due where Criminal surrenders.—G.,¹ having been guilty of forgery, absconded. W. published a handbill, offering a reward of £200 "to any person or persons giving such information to A., superintendent of police, Dewsbury, or to H., superintendent of police, Wakefield, as will lead to the apprehension of the said G." Later on, at Exeter, a man (who was G.) said to B. (who was chief constable), "You hold a warrant for me: I am wanted for forgery." B. searched a police gazette, and finding a notice therein, "W. G. wanted for forgery," telegraphed to A., "Do you hold a warrant for the apprehension of W. G. for forgery?" Receiving an answer, "I still hold warrant for G., and should like him to be apprehended," B. then apprehended and charged G., who was ultimately convicted. B. sued W. for the reward. In answer to the questions left to them, the jury found that G. was not in custody before the telegram was sent; but they were unable to agree as to whether or not he had given his name before it was sent. Held, that B. was not entitled to claim the reward—the apprehension of G. not being the consequence of B.'s information, but of the criminal surrendering himself to justice.

¹ *Bent v. Wakefield Bank*, 4 C. P. D. 1.

Reward due even where Confession Voluntary.—M.¹ advertised a reward of £20 to any person who would give such information as should lead to the apprehension and conviction of the parties who had robbed and set fire to their premises. S. took B. into custody on suspicion of being concerned in the offence. B. offered to make certain disclosures if furnished with something to eat and drink. S. communicated this offer to T., a sub-inspector of police, who took B. into a public-house and gave him refreshment, whereupon B. made a voluntary confession which resulted in his conviction and transportation for the crime in question. Held, that S. was entitled to the reward.

Arrest of Criminal before Reward advertised.—K.² issued an advertisement offering a reward of £10 to any one who would give such information as should lead to the recovery of a horse and gig stolen at Woolwich, and the apprehension of the thief. N. apprehended a boy (in Bedfordshire) having a horse and gig under circumstances of suspicion. Discovering that the boy came from Woolwich, N. gave notice to his superintendent, who within a reasonable time gave notice to K., the boy's master. Meantime, after the boy's apprehension, but before the master received notice thereof, K. had issued his advertisement offering the reward. N. brought an action for the reward, and K.'s plea, charging N. with a breach of duty in neglecting to inform K. of the boy's apprehension until after the issuing of the advertisement, was held to be no answer to an action for the reward.

¹ *Smith v. Moore*, 1 C. B. 438; 9 Jur. 352.

² *Neville v. Kelly*, 12 C. B. (N. S.) 740.

Information must be given with a View to its being acted on.—B.¹ offered a reward of £100 for “such information as should lead to the early apprehension” of the person who had stolen a parcel containing bank-notes. R., the thief, passed one of the notes at the shop of L., whose suspicions were aroused. L. consulted C., and both discussed the matter with their neighbours. L. proposed to go for a constable, but S., who was present, said he had better go, and accordingly went and brought back the constable. The constable, upon the information he received, was enabled to find out and apprehend R. To an action brought for the reward, B. replied (1) that L.’s communication to C. did not entitle him to recover, as it was not made either to the party offering the reward or an agent of his; (2) that the information to the constable, being made jointly by L. and C., was not such information by L. alone as led to the apprehension of R., and that C. should have been joined in the action as co-plaintiff. On the first issue, the judge at the trial directed the jury to find for L., which they accordingly did. The jury found that the information given to the constable by S., and which led to the apprehension of the criminal, was the joint information of L. and C. The second issue was thereupon entered for defendant. It was held that the jury came to a proper verdict on the second issue. The head-note runs: “Held, that the information must be given, not in mere conversation, but with a view to its being acted upon, either to the person offering the reward, or to his agent, or to some person having authority by law to apprehend the criminal. And where the communication was first made by L. to C. in conversation, but the information was afterwards communicated to a

¹ *Lockhart v. Barnard*, 14 M. & W. 674.

constable jointly by L. and C., it was held that they both ought to have joined in the action."

Mere Apprehension not enough to earn Reward.—E.,¹ a military officer who had been robbed of some jewels, issued a handbill to the effect that the sum of £30 "will be paid by E. on recovery of the property, and conviction of the offender, or in proportion to the amount recovered." F., a soldier, informed his sergeant that B. had admitted to him that he was the party who committed the robbery, and the sergeant informed the police. Four days afterwards T., a policeman, apprehended the offender, and, the jury found, "was most active and mainly instrumental in procuring the recovery of the property and the conviction of the offender." Held, that T. was not the party entitled to the reward. *Seemle, per Tindal, C.J., and Cresswell, J.,* that F. was the party entitled. *Quære, per Coltman, J.,* whether F. and T. might not have jointly sued.

Giving Information a Good Consideration.—D.² advertised a reward of £50 to whoever could give such information as would lead to the conviction of a felon. E., who was a police-constable in the district where the felony was committed, gave such information and collected evidence. Held, that E.'s having given the information was a good consideration for a promise by defendant to pay the reward.

Person giving First Information entitled to Reward.—W.³ was robbed on the highway of bank-notes to the

¹ *Thatcher v. England*, 15 L. J. C. P. 241.

² *England v. Davidson*, 11 Ad. & E. 859.

³ *Lancaster v. Walsh*, 4 M. & W. 16.

amount of £90. He then issued a handbill, in which it was stated: "Whosoever would give information whereby the same might be traced should, on conviction of the parties, receive a reward of £20." Held, that the only person entitled to the reward was he who first gave information by which the notes were traced to the robbers so as to ensure their conviction; and that it was not necessary that such information should be communicated to the party robbed if it was given to a person authorized to receive it and to act upon it in the apprehension of the offenders.

Railway Time-Table amounts to Contract with Persons acting on it.—The defendants'¹ line communicated with the line of another railway company at M. Arrangements were made whereby the defendants' trains starting from P. at 7 p.m. and going to M., there met a train of the other company, running from M. to H., by which passengers from P. to H. were forwarded. The defendant company published monthly time-tables, in which they stated, in the usual way, that the 7 p.m. train from P. carried to H. At the end of a month, after the defendants' time-tables for the ensuing month were prepared in this form and printed, but before they were published, the other company discontinued the train from M. to H. The defendant company made no alteration in their time-tables already printed, but published and circulated them after they knew that there was no such train. D., having seen one of these time-tables, made his arrangements on the faith of it to go from P. to H. by the 7 p.m. train; he came to P. in time, went to the station, and then for the first time learned that he could go no further than M.

¹ *Denton v. Great Northern Railway*, 5 E. & B. 861.

by that train. He was delayed on his journey, and sustained damage, for which he sued the defendant company. Held, he was entitled to recover on the ground that the circulation of the time-tables amounted to a representation that there was a train, which was false to the knowledge of those making it, and calculated to induce the plaintiff to act as he did. Held also by Lord Campbell, C.J., and Wightman, J., that the time-table amounted to a contract on behalf of the company with those who should come to the station, to forward them as stated in the table. Crompton, J.: "I entertain some doubt as to how far the liability of the defendants can be rested upon contract. I do not mean to say that the facts do not establish a contract. It is very like the case of an advertisement offering a reward; but in that case there is the consideration of work done, and I never could see why an action for work done would not in such a case lie. It would be difficult to distinguish this case from an advertisement at a shop, offering to sell goods upon certain terms, or an advertisement of the sailing of a particular ship for a particular port."

Mere Disclaimer of Responsibility for Delay no Release from Contract.—L.¹ booked at the L. & N. W. station at Liverpool for Scarborough *viâ* Leeds and York. From Leeds to York the journey was over the lines of other companies. The ticket referred to the conditions in the published time-bills of the defendant company, which stated: "The granting of tickets to passengers off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or

¹ *Le Blanche v. L. & N. W. Railway Co.*, C. P. D. 287.

injury whatsoever arising off their lines, or from the acts or defaults of the other parties, nor for the correctness of the times over lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party." L. travelled by a train which reached Leeds too late to proceed to York, and when he did get to York he found that the train for Scarborough, which he should have caught, was gone. He therefore took a special train to Scarborough. In a county court action the judge held that there was a contract on defendants' part to use diligence to ensure punctuality, and that upon the facts there had not been such diligence used. He also held that the plaintiff was entitled to recover the cost of the special train on the authority of the dictum of Alderson, B., in *Hamlin v. Great Northern Railway* (26 L. J. (Ex.) 22), that "where one party to a contract does not perform it, the other may do so for him as near as may be, and charge him for the expense incurred in so doing." Held, that the judge was wrong in acting on the dictum above mentioned as an absolute rule. The principle is that if one party does not perform his contract the other may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing.

CHAPTER II

MISREPRESENTATION IN ADVERTISEMENTS, AND ITS LEGAL CONSEQUENCES

ALTHOUGH words of general praise involve no legal responsibility, the representations made in advertisements, in so far as they relate to specific facts, or in so far as they are material to any agreement that may arise therefrom, are binding on the advertiser. The maxim, *Simplex commendatio non obligat*, applies to the mere description of articles, but misrepresentation as to material and specific facts, even though innocent, may be fatal to a contract of sale, or give the purchaser a remedy for breach of warranty. Innocent misrepresentation is a misstatement of fact made without knowledge of its untruth and without intention to deceive, which either induces a party to enter a contract, or is a condition or term of the contract. A man is generally safe in stating what he believes to be true; still more is he safe in giving his opinion as an opinion for what it may be worth. Moreover, passive acquiescence in the self-deception of others is not fraud. But the fact that a public advertisement is not addressed to any one in particular, or that it cannot mislead people of ordinary intelligence or judgment, does not affect its legal consequences should it be material to the contract or wrong that ensues. "It is now well established," said

Cockburn and Quain, L.JJ., in *Swift v. Winterbotham*,¹ "that in order to enable a person injured by false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even is made to the public generally with the view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby." "It may be," observed Hawkins, J., in the *Smoke Ball* case, "that of the many readers of the advertisement very few of the sensible ones would have entertained expectations that in the event of the smoke ball failing to act as a preventive against the disease the defendants had any intention to fulfil their attractive and alluring promise. But it must be remembered that such advertisements do not appeal so much to the wise and thoughtful as to the credulous and weak portions of the community; and if the vendor of an article, whether it be medicine smoke or anything else, with a view to increase its sale or use, thinks fit publicly to promise to all who buy or use it that, to those who shall not find it as surely efficacious as it is represented by him to be, he will pay a substantial sum of money, he must not be surprised if occasionally he is held to his promise."

Where a contract is based on fraud, the elements that constitute fraud are (1) the false representation of facts must be made by one party to the contract; (2) such representation must be made either with a knowledge of its falsehood, or (2a) without an honest belief in its truth; (3) the motive for making such representation must be

¹ 8 Q. B. 241.

that it should (4) deceive the other party to the contract, and (5) be acted upon by the other party; (6) such a misrepresentation must, in fact, deceive the other party; (7) such misrepresentation must have induced the contract. A fraudulent misrepresentation in an advertisement, even where it leads to no contract, may be ground of an action for deceit,¹ where A, advertising that he was going to let a farm, although he knew he had no power to let the property, was held guilty of fraudulent misrepresentation for which an action would lie; and an advertisement of a fraudulent character is admissible in evidence against the persons charged with fraud.² When A entered into an agreement with B under a false name, and concealed his identity so as to induce B to believe he was dealing with a person other than A, such a misrepresentation entitled B to repudiate the contract within a reasonable time after discovering the false identity.³ Where the false representation is honestly believed by the person making it, though on most insufficient grounds, as where it is made through carelessness or without realizing the importance and significance of the words used, it is innocent but not fraudulent misrepresentation.

A statement of specific and material fact as to the quality of an article contained in an advertisement amounts to a warranty the breach of which gives a right of action.⁴ When innocent misrepresentation is material to or induces a contract, it affords ground for cancelling the contract or for refusing specific performance of it, but not for damages. This rule, which now applies to contracts

¹ *Richardson v. Silvester*, 9 Q. B. 34.

² *Lucas v. Godwin*, 4 Scott, 503.

³ *Gordon v. Street*, 1899, 2 Q. B. 641.

⁴ *Shepherd v. Kain*, 5 B. & Ald. 241.

of every description, was first applied in *Redgrave v. Hurd*,¹ where it was held that if A induces B to enter into an agreement by a material representation which is untrue, it is no defence, when B seeks to rescind the contract, to plead that B had the means, and might with reasonable diligence have discovered it was untrue. Where an advertisement was headed, "Money on easy terms," and it led to an agreement for repaying money on severe terms, it was held that the onus lay upon the advertiser to show that he had removed the impression produced by the advertisement before the agreement was signed.²

A's description in an advertisement of B as "a most desirable tenant," when, in fact, B was in arrears with his rent, was held to amount to misrepresentation on which a contract could be set aside, and "not a mere flourishing description."³ The loose opinion of an auctioneer as to the quality of the thing sold is no misrepresentation.⁴ It may be classified among the commendatory expressions such as men habitually use in order to induce others to enter a bargain, and in regard to which a certain latitude is permitted. But it is not always easy to discern the exact limit of such latitude. Lord Justice Bowen⁵ described the border-line between a mere expression of opinion and a statement of fact in the following terms: "In considering whether there was a misrepresentation, I will first deal with the argument that the particulars only contain a statement of opinion about the tenant. It is material to observe that it is often fallaciously assumed

¹ 20 Ch. D. 1.

² *Moorhouse v. Woolfe*, 46 L. T. 374.

³ *Smith v. Land and House Property Co.*, 28 Ch. D. 7.

⁴ *Scott v. Hanson*, 1 Sim. 13.

⁵ *Smith v. Land and House Property Co.*, 28 Ch. D. 7.

that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such an opinion is, in a sense, a statement of fact about the condition of a man's mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally well known to both sides, then a statement of opinion by one who knows the facts involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion." If A advertises for sale B's pianos, knowing that he has none in his possession, and that B has refused to supply him with them, he is within his legal rights, for he might have otherwise acquired the instruments, and B, before he can sustain a charge of fraudulent misrepresentation in such an advertisement, must show that the damage he has sustained is attributable to the misrepresentation.¹ This case is authority also for the proposition that an advertiser's willingness to sell an article not in his possession, and with which the maker has refused to supply him, is no misrepresentation.

To be Actionable, Misrepresentation in Advertisement must not only be Untrue, but cause Damage.—A.,¹ manufacturers of pianos in London, supplied W., a furnishing contractor in Manchester, with two pianos of a certain class on January 26 and July 15, 1895; a piano of another class on April 25; two pianos of a third class on April 25 and May 5. The two last pianos formed part of

¹ *Per Kekewich, J., in Ajello v. Worsley, 1898, 1 Ch. 275.*

an order for twelve pianos of the same class, but A. refused to supply W. with the remainder of the order on the ground that W. had advertised the sale of the pianos at too low a price. A.'s refusal to supply him with further pianos became known to W. in August or September, 1895. In February, 1896, W. advertised in certain papers in Lancashire that he would sell a new piano of A.'s manufacture of a specified character at the price at which A. had supplied the same to the trade. Whereupon other dealers gave up dealing with A. W. continued the advertisement after he ceased to have in stock any pianos of A.'s manufacture, and after A. had refused to supply him, in the expectation that he would be able to acquire A.'s pianos from other dealers. A. then applied to the courts for an injunction to restrain W. from continuing the advertisement, but the court refused to grant it. *Per Kekewich, J.*: "The defendant could not get from the plaintiffs directly any of their new pianos; but in my opinion he might have acquired new pianos of theirs otherwise upon terms which would not indeed enable him to sell at a profit, but which need not have involved a ruinous loss. If, then, the defendant had seen fit to advertise that he was prepared to supply new pianos of the plaintiffs' manufacture . . . I think that he would have been within his legal rights." It was said that the advertisement actually published contained a misrepresentation, in that such pianos as were described therein were not in the possession of the defendant at the dates when the advertisement appeared. "In my judgment," observed Kekewich, J., "this misrepresentation does not make the advertisement fraudulent, and in order that a misrepresentation may be actionable, it must not merely be untrue, but cause damage to the person who

complains of it. The question then arises, Is the damage complained of by the plaintiffs attributable to the misrepresentation of fact contained in the advertisement? It appears to me that this question must be answered in the negative; for an advertisement such as, in my opinion, the defendant might have legally issued, would have produced precisely the same consequences, and been followed by the same damaging results. No decision in support of such an action as the present was cited in argument. What was mainly relied on by the plaintiffs' counsel was the passage from the judgment delivered by Bowen, L.J., in the *Mogul Steamship Co. v. McGregor*: 'No man, whether trader or not, can justify damaging another in his commercial business by fraud or misrepresentation. . . .' In my opinion," continued Kekewich, J., "the present case does not fall within those in which damage is caused by misrepresentation within the meaning of the Lord Justice. The class of cases which he probably had in his mind was that of which *Ratcliffe v. Evans* is an example—namely, where the defendant has intentionally published an untrue statement regarding the plaintiffs' business, and thereby has, in the ordinary course, caused damage to the plaintiff. Here the untrue statement related to the defendant's own business, and I may point out that, if it affected the plaintiffs' business at all, it did not affect it exclusively, for . . . every music-dealer in the neighbourhood of Manchester who happened at the time to have a piano of plaintiffs' in his shop, suffered damage as well as the plaintiffs. However, for the reasons already given, I think the damage was not caused by the misrepresentation contained in the advertisement, and consequently the action fails, and must be dismissed."

Auctioneer's Loose Opinion no Misrepresentation.—A¹ described a piece of land, in the particulars of sale, as “uncommonly rich water-meadow land,” and B bought the land. The meadow, on account of its high level and the low level of the adjoining land, was imperfectly watered. B pleaded that it was misrepresentation to describe it in those terms, when, in point of fact, it was imperfectly watered. Held, that the words “uncommonly rich” referred to the quality of the land, and not to its watering, and in that sense it professed to be nothing more than the loose opinion of an auctioneer or vendor as to the obvious quality of the land, upon which the vendee ought not to have placed any reliance.

Description of F. in Advertisement as a Desirable Tenant, when F. was in Arrears with his Rent, amounts to Misrepresentation.—In August, 1882, S.² put up a hotel for sale, stating in the particulars that it was “let to F., a most desirable tenant, at a rental,” etc. M. bought the property on behalf of defendants. Before completion F. became insolvent, and M. refused to complete. S. was sued for specific performance. Denman, J., held that there was a material misrepresentation in regard to F., and that the contract had been entered into in reliance upon it. Held, on appeal, (1) that the description of F. as a most desirable tenant was not a mere expression of opinion, but contained the implied assertion that the vendor knew of no facts leading to the conclusion that he was not; (2) that F. was not a desirable tenant to the knowledge of S.; and (3) that there was a misrepresentation. *Per* Bowen, L.J.: “In considering whether there was a

¹ *Scott v. Hanson*, 1 Sim. 13.

² *Smith v. Land and House Property Co.*, 28 Ch. D. 7.

misrepresentation, I will first deal with the argument that the particulars only contained a statement of opinion about the tenant. It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve a statement of fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such an opinion is, in a sense, a statement of fact about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally well known to both sides, then a statement of opinion by the one who knows the facts involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

Advertiser bound by the Impression produced by the Advertisement.—M.,¹ a farmer, saw an advertisement issued by W., a money-lender. The advertisement was headed "Money on easy terms," and contained a statement that money would be advanced on note of hand to, among others, farmers on very easy terms, and on reversions, etc., at 5 per cent. No other rate of interest was mentioned in the advertisement. M. went to W.'s office, and applied for a loan of £100. W.'s agent told him the rate of interest would be 5 per cent., and after negotiations M. (who thought that a rate of 5 per cent. demanded by his solicitors was too high, and had therefore gone to W.) agreed to pay $4\frac{1}{2}$. He executed a bill of sale, in the belief that it was to secure £100, with interest at $4\frac{1}{2}$ per cent. by weekly instalments. The bill of sale was, in fact, a security for the repayment of £150 by weekly instalments

¹ *Moorhouse v. Woolfe*, 46 L. T. 374.

of £2 10s. M. brought an action to set aside the bill of sale. Held, that where a man represents to the public by advertisement that he will lend money on easy terms, and afterwards lends it on very hard terms, the onus lies upon him to show that he has removed from a borrower's mind the impression produced by such representation, and clearly explained to him the terms on which the loan has been made. On the evidence the Court believed M.'s statement, and set aside the bill of sale.

Contract rescinded if Material Representation in Advertisement be Untrue.—R.,¹ a solicitor, published in the *Law Times* an advertisement headed "Law partnership," stating that the advertiser, an elderly solicitor of moderate practice, with extensive connections, shortly retiring and having no successor, would first take as partner an efficient lawyer who would not object to purchase the advertiser's suburban residence, value £1600. H., who answered the advertisement, was told by R. that the business brought in about £300 a year. A subsequent interview was arranged to show H. the amount of business done for the last three years. R. then produced three summaries, showing that the business amounted to not quite £200 a year. When H. asked how the difference between the £300 and the £200 was made up, R. showed him a number of papers which he said related to other business not included in the summaries. These papers, which H. did not examine, showed only a most trifling amount of business, and the gross returns of the business were, in fact, only about £200 a year. H. afterwards signed an agreement to purchase the house for £1600, and paid a deposit. R. refused to have any reference to the business inserted in the agreement.

¹ *Redgrave v. Hurd*, 20 Ch. D. 1.

H. took possession, but finding, as he alleged, that the business was worthless, refused to complete. R. brought an action against H. for specific performance of the contract. H. pleaded misrepresentation as to the business, and by a counter-claim claimed on the same ground to have the contract rescinded, and to have damages on the ground of the expense he had been put to, and the loss incurred by giving up his own practice. He did not in his counter-claim specifically state what representations had been made, nor allege that they were false to R.'s knowledge.

Held, by Fry, J., that H., having had the opportunity afforded him of ascertaining the truth of the representations made to him as to the amount of the business, and having to some extent, though carelessly and inefficiently, inquired into it, must be taken not to have relied on the representations, and that R. was entitled to specific performance.

Held, on appeal, that where one person induces another to enter into an agreement with him by a material representation which is untrue, it is no defence to an action to rescind the contract that the person to whom the representation was made had the means of discovering, and might with reasonable diligence have discovered, that it was untrue.

Held, further, that it is no defence in such an action that H. made a cursory and incomplete inquiry into the facts, for that if a material representation is made to him, he must be taken to have entered into the contract on the faith of it, and, in order to take away his right to have the contract rescinded, it must be shown either that he had knowledge of facts which showed it to be untrue, or that he stated in terms or showed clearly by his conduct that he did not rely on the representation.

Held, further, that H. was entitled to have the contract rescinded, and the deposit returned, but that, as he had not pleaded knowledge on R.'s part that the statements as to the business were untrue, and had not specifically alleged it in his counter-claim, he could not recover damages.

Breach of Warranty founded on Statement in Advertisement.—K.¹ published an advertisement offering a ship for sale. The vessel was described as “copper-fastened,” but these words were subjoined: “The vessel, with her stores, as she now lies, to be taken with all faults, without allowance for any defects whatsoever.” The ship, when sold, was only partially copper-fastened, and she was not what was called in the trade a copper-fastened vessel. S., before he bought, had had a full opportunity to examine her situation. S. sued K. for breach of warranty, and obtained a verdict. K. applied for a new trial, but the verdict was upheld. *Per Currain*: “The meaning of the advertisement must be that the seller will not be responsible for any faults which a copper-fastened ship may have. Suppose a silver service sold ‘with all faults,’ and it turns out to be plated,—‘with all faults’ must mean with all faults which it may have consistently with its being the thing described. Here the ship was not a copper-fastened ship at all; and therefore the verdict was right.”

Fraudulent Misrepresentation in Advertisement Ground of Action for Deceit.—S.² advertised in a newspaper the letting by tender of a farm with immediate possession.

¹ *Shepherd v. Kain*, 5 B. & Ald. 241.

² *Richardson v. Silvester*, 19 Q. B. 34.

R., believing in the *bonæ fides* of the advertisement, incurred expense in inspecting the property and employing persons to value it for him. According to the particulars of claim, S. had no power to let the property as advertised, and caused the advertisement to be issued to serve some purpose of his own other than that appearing by the advertisement; and he, S., knew at the time he advertised that he had not the power to let the farm. The county court judge ruled that the particulars disclosed no cause of action for legal fraud and deceit, and nonsuited R. Held, that the particulars contained allegations amounting to fraudulent representation, for which an action would lie.

Advertisement admissible as Evidence of Fraud.—L.¹ entered into a contract with G.'s son (who was found to be acting for his father) for building certain cottages, G. promising to pay £216 "on condition of the work being done in a proper and workmanlike manner on January 1, 1837, and to be completed on October 10, 1836." The cottages were not completed by October 10, but G. afterwards took the benefit of the contract. Towards the end of September suspicions arose as to the solvency of G. and his son, especially of the latter, and on the 23rd of that month the son put an advertisement into the *Stamford Mercury*, circulating in the district, intimating that G. and his son had succeeded to an estate in America on the death of a relative, and were on a given day and at a certain place to receive a large sum of money. G. gave currency to a report that his son had gone to Philadelphia to take possession of the estate, whereas, in fact, he was in confinement on a conviction for

¹ *Lucas v. Godwin*, 4 Scott, 503.

misdemeanour. About the time the advertisement appeared B. read it to G., who recognized it as applying to himself. The advertisement turned out to be a mere fabrication. L. had sent in his bill to G.'s son. At the trial plaintiff relied on the advertisement as evidence of the fraudulent compact into which the father and son had entered. The admission of the advertisement in evidence was objected to on the ground that the newspaper produced was not the identical paper read by B. The judge, however, received it as evidence of the fact that about the time of the conversation with B. a newspaper had appeared containing an advertisement which corresponded with that read to G. Held, that the judge was right in receiving such evidence.

Misrepresentation in Advertisement inducing Contract may justify Repudiation of Contract.—G.,¹ a money-lender, advertised under a fictitious name, and S. borrowed money, and gave a promissory note to secure the sum borrowed and interest. In an action on the promissory note, the jury found that G. intentionally concealed his identity to induce S. to borrow money from him as if from another, and that S. was so introduced that G. did so fraudulently, that S. entered into the contract believing that he was doing so with a person of the fictitious name given by G. S. repudiated the contract within a reasonable time of his discovering that G. was the person with whom he had contracted. Held, that the fraudulent concealment by G. of his identity with a person whose reputation in business was such that S. would not have dealt with him, was material to the inducement which brought about the contract. S. was therefore entitled to

¹ *Gordon v. Street*, 1899, 2 Q. B. 641 C. A.

repudiate it within a reasonable time after the discovery of the fraud. *Per* A. L. Smith, L.J.: "The first question is not whether the fraud was material to the contract entered into, but whether the fraud was material to the inducement which brought about the contract." *Per* Vaughan Williams, L.J.: "I only wish to mention the case of *Moorhouse v. Woolfe* as showing how in this case the effect of the issue of the advertisement which was issued by plaintiff made the misrepresentation contained in it material to the inducement of the contract so as to entitle the defendant to take the course that he has done."

CHAPTER III

ADVERTISEMENT ORDERS AND OTHER AGREEMENTS

1. BREACH OF CONTRACT

THE form of such advertising contracts as those of which precedents are set out in the "Encyclopædia of Forms and Precedents"¹ is so complete that little or no litigation has hitherto arisen therefrom. The great mass of advertising contracts, however, pertains to the ordinary announcements in newspapers and magazines, in which cases the document used is a form of advertisement order, varying a good deal in character and often incomplete. Under the Statute of Frauds (sec. 4) a contract to take in a literary work (to be published periodically) in parts extending over more than a year, and to be paid for as the parts are delivered, requires to be in writing.² And according to one authority,³ it would be the same with contracts for the insertion of advertisements extending over more than twelve months.

Where the advertisement order or agreement is on the face of it an ordinary contract, it follows that any breach of its terms, either on the one part or on the other, is a wrong for which the defaulting party is liable in damages. Negligence to insert an advertisement even once is breach

¹ Vol. i. p. 229.

² *Boydell v. Drummond*, 11 East, 142.

³ Powell's "Law affecting Printers," p. 228.

of the contract under which the advertiser and the newspaper owner have agreed to insert the advertisement.¹ Where an advertiser has contracted for a particular space in the advertisement pages, he has a right to the continued use of that space for the full term of the contracted period, and for discontinuance of the advertisement on the part of the newspaper proprietor damages may be recovered.² Similarly it is conceivable that negligence on the part of the printer in setting a wrong date in an advertisement, where the date goes to the essence of the contract, say of a sale or a concert, would render the newspaper proprietor liable in damages to the aggrieved advertiser. Want of legality in the object of the contract nullifies the effect of an advertising agreement, just as it does in other contracts. If the object of the advertisement be in any way illegal or immoral, the contract may be repudiated as soon as its real character is discovered, and, moreover, any money paid in respect thereof becomes irrecoverable.³ The courts will enforce an advertisement agreement, whether it be contained in letters or simply in the form of an advertisement order.⁴

Discontinuance of Advertisement a Breach of Contract.—M.³ was a ladies' tailor, and in February, 1894, for the purpose of starting his business, he took the ground floor of a house situated at 37, Alfred Place, Bedford Square. There were no means of displaying his goods in the window, and he had to rely on advertising as the only way of obtaining customers, and accordingly he determined to advertise in the *Jewish Chronicle*, a paper which was

¹ *Hawkins v. Tuxford*, *Times*, Dec. 23, 1867.

² *Marcus v. Mayers and Davies*, 11 T. L. R. 327.

³ *Owen v. Greenburg*, *Times*, March 10, 1898.

⁴ *Metzler v. Gounod*, 32 L. T. 656.

owned by Mayers and Davies. No other ladies' tailor had an advertisement in the paper. Originally, the *Jewish Chronicle* had no outside cover, but about this time a cover had been put upon it, which was filled with advertisements. M. gave an order for thirteen weekly insertions in the paper, and this advertisement turning out a very great success, in May, 1895, a further contract was entered into, and it was upon this last contract that the present case turned. A written order to the following effect was given: "Please insert my advertisement in the front page of the *Jewish Chronicle* for one year (fifty-two insertions), payments to be on the dates as arranged." This order was given by M. at the office of the paper in May, and a piece of paper was given to him upon which the dates for payment were written. The advertisement appeared and the payments were made, and no difference occurred till September, 1894, when the advertisement was discontinued. After the advertisement was omitted, M. found that his customers fell off, and he accordingly brought this action to recover damages for the breach by the defendants of this contract. The defence was that the written order of May, 1894, and the paper given on the same day did not contain the contract, and that there were other terms, viz. that there must be no consecutive appearance of the advertisement, and that if the outside page was occupied, the defendants could either omit M.'s advertisement or put it in some other place. It was further contended on behalf of defendants that it was impossible to tell what loss of business resulted from the advertisement being discontinued, and that the true measure of damages was the cost of the advertisement. The jury found (1) that the contract was contained in the two papers of May, 1894; (2) that there had

been a breach; (3) and assessed the damages at £60. In giving judgment, Kennedy, J., said, "The question here is, What is the true measure of damages? The jury, having been directed by me, according to the law laid down in *Hadley v. Baxendale*,¹ found that the plaintiff suffered substantial damages. The defendants contend that these damages are too remote and speculative, and that evidence of loss of business is not admissible. I have come to the conclusion that the damages found by the jury are properly recoverable under the circumstances of the case. The plaintiff contracted with the defendants for a particular advertisement space in the *Jewish Chronicle*, which is the particular journal of the Jewish world. He contracted to have that space for twelve months. The defendants knew the object of the advertisement. If it be material, I think they ought to be taken to have known at the time that if they broke the contract the result would be, as a natural consequence, loss to the plaintiff in his business. The plaintiff said he suffered loss of business to the extent of £100, which he attributed to the loss of the advertisement. During the time of the breach he did not get a single new Jewish customer. No suggestion was made by the defendants as to any other cause of the loss of business. The defendants knew that the plaintiff could not get the advertisement inserted in a journal of such unique position in such a place as they had contracted to give to him. I am of opinion that the evidence of loss of business was proper for the consideration of the jury in assessing the damages."

Omission of Advertisement also a Breach of Contract.—

¹ 9 Ex. 354.

H.¹ was a miller and corn-dealer, and occupied a steam flour-mill at Belper. In November, 1864, he was desirous of selling the mill. Accordingly, he instructed the agents of Messrs. Smith and Sons, at Derby, to insert advertisements of the sale in certain papers, including the *Mark Lane Express* and in the *Magnet*. T. was the proprietor of the *Mark Lane Express*, and H. ordered the insertion of the advertisement in that paper in its issues of November 21 and November 28. By some mistake the advertisement was not inserted in the *Mark Lane Express* of November 28, and Messrs. Smith and Sons omitted to send the advertisement to the *Magnet*. The sale was held on December 24, but, as H. alleged, in consequence of the absence of proper advertisements, the attendance was very small, and no sale was effected. On applying for compensation T. admitted his clerk's error, and offered to insert an advertisement gratis if another sale was contemplated. No suggestion was made by the defence that the omission of the advertisement was not a breach of contract. T. simply pleaded that his contract was with Messrs. Smith and Sons, and not with H. This raised the question of agency, which was the only point discussed. H. proved he was the principal, and Messrs. Smith merely agents. The jury assessed the damages at £20.

Advertising Contract of an Illegal or Immoral Nature not Enforceable.—G.² was an advertising contractor, and O. was an advertiser who carried on the business of selling patent medicines. O. paid G. in advance the cost of inserting an advertisement relating to medicines for ladies in a paper called *Pick-Me-Up*. The advertisements

¹ *Hawkins v. Tuzford*, *Times*, Dec. 23, 1867.

² *Owen v. Greenburg*, *Times*, March 10, 1898.

appeared for some time, but upon a change in the proprietorship of the paper it was discovered that the advertisements related to an improper practice, and the new proprietors declined to insert any further advertisements. O. then sought to recover from G. the money he had paid in respect of the time during which the advertisements did not appear, and also damages for non-insertion. G. swore that the advertisements appeared in any number of respectable papers, and at the time he took them he did not know there was anything of an illegal or immoral nature in them. If he or the proprietors of the paper had known the nature of the advertisements, they would not have been inserted. The question left by Darling, J., to the jury was, Was it intended by the advertisements to convey that the medicines would procure miscarriage or abortion? If so, the advertisement was illegal, and the contract was illegal, and O. could not recover his money. The jury answered the question in the affirmative, and a verdict was given for G.

Terms of Advertising Contracts collected from Letters.—

M.¹ were the proprietors of a journal called *The Choir*, and G. was a musical composer. G. signed the following letter: "I hereby guarantee to the proprietors of *The Choir* two hundred and fifty additional annual subscriptions to this paper. In consideration of which the proprietors of *The Choir* undertake to give me the free use of one column of space in each number. The said column to be occupied in such proportions as may appear to me from time to time most convenient with notices to (*sic*) the 'Gounod's' Choir, at present in course of formation, and advertisements of M. Gounod's musical compositions.

¹ *Metzler v. Gounod*, 32 L. T. 656.

It being at the same time understood that the notices to (*sic*) *The Choir* are to be put in a good place in the paper, and that the advertisements are to appear among the ordinary advertisements at the end of each number. I likewise undertake to insert the name of *The Choir* as my organ in my standing advertisement in the *Independence Belge*, and to do my best to get frequent mention made of *The Choir* in that and other newspapers. This agreement is to hold good for one year, from the 31st December, 1872." There was also an agreement by M. to insert G.'s advertisement in *The Choir* in consideration of G. guaranteeing 250 additional subscriptions. This agreement made no mention of the *Independence Belge*. It was signed by M., and was followed by this postscript: "P.S.—The payment for the above-named subscriptions to be complete by the 31st December, 1873: Metzler & Co." Later on, disputes arose between the parties as to the manner in which the agreement was to be carried out, and G.'s agent wrote M. a letter, which was treated by them as a repudiation of the agreement. The question raised for the consideration of the Court was, Did the two letters form a valid agreement? Brett and Huddleston, JJ., held that there was a binding contract.

2. OPTIONS AND TRADE CUSTOMS

In the interpretation of advertising contracts a good deal of discussion arises in regard to certain customs in the trade, and the effect of these usages upon agreements made between advertisers and the owners of the publications where the advertisements appear. Sometimes the

wording of the advertisement order itself is vague or ambiguous, and the Court has to interpret it.

Options of various kinds exist in the advertising trade, and are sometimes embodied in written contracts. Options of a unilateral kind are contained in contracts executed in such different trades as the building¹ and the printing trade.²

It may also happen that the written agreement is ambiguous in its references to this point. One of the earliest cases of this kind on record is that of *Measom v. Finnigan*, where there was a unilateral option to the advertiser.³ F. was a trunk-maker at Manchester, and M. proprietor of several illustrated railway guide-books. M. furnished printed forms on which orders to insert advertisements in the guide-books were taken. The forms contained a prospectus of the work, the terms, and a printed blank form of order. On March 8, 1859, F. signed one of these documents. It commenced: "One trunk-maker only in Manchester. London and North Western Railway." (Here followed a letter from the general manager, requesting the officials of the company to afford information to M. Then followed the prospectus of the work, and then the following): "Scale of charges for advertising, including a copy of the work (each page to be headed 'Official Advertiser'), whole page, £5 5s.," etc. "Order for insertion. March 8, 1859. Sir,—Please to insert in 'The Official Illustrated Guide to the North Western Railway and its Branches,' by George Measom, my advertisement, to form one page.

¹ *Whitbread & Co. v. Watt*, 1 Ch. 911; *Marsden v. Sambell*, 28 W. R. 953.

² *Gillett v. Mauman*, 1 Taunt. 138.

³ 11 W. R. 439.

To last two years from date ; to be renewed on the same terms at the end of that period, provided a second edition shall be printed. No other trunk-maker in Manchester to appear.—(Signed) B. Finnigan.” M. accepted this order, and F.’s advertisement was duly inserted in the first edition for the period named in the order. At the end of that period M., having sold off nearly the whole of the first edition, gave notice to F. that he intended to issue a second edition, and to renew the insertion of F.’s advertisement therein, on the same terms as in the first edition. But F. refused to allow the advertisement to appear therein, and withheld and refused to return to M. (though requested by M. so to do) the block of a picture which had appeared in F.’s advertisement. At the trial the jury returned a verdict for the plaintiff on all the issues, but Bramwell, B., reserved leave to F. to enter a verdict. A court, including Blackburn, Wightman, and Kealing, JJ., held that the meaning of the contract was that if a second edition should be brought out, F. should have the option to renew his advertisement upon the same terms.

Options, such as that reserved in the contract discussed, may be created either by the express terms of the agreement or by the customs or usages of the trade. Where the existence of the option is clearly indicated in the language of the advertisement order, evidence of custom in the trade is not only inadmissible but unnecessary. Where, however, the option is reserved verbally where the order is given, but the agreement is silent on the point, a serious difficulty arises in the way of admitting evidence of the custom of the trade. The cases in which evidence of custom is receivable to annex

incidents to written contracts have been clearly laid down in the courts. As far back as 1800 Lord Eldon¹ expressed the opinion that the practice of admitting usage to explain contracts ought not to be extended. The limits set to the admissibility of such evidence are clearly set out in the judgment of Parke, B., in *Hutton v. Warren*.² From his language it may be collected that evidence of custom or usage will be received to annex incidents to written contracts on matters with respect to which they are silent, not only in contracts between landlord and tenant, but in commercial contracts and other occupations where known usages have been established and prevailed. Such evidence, however, is only receivable where the incident which it is sought to import into the contract is consistent with the terms of the written instrument.³ If inconsistent, the evidence is not receivable, and this inconsistency may be evinced (*a*) by the express terms of the written instrument; and (*b*) by implication therefrom. The usage of which evidence is tendered must be reasonable,⁴ must be general,⁵ need not be annexed,⁶ and it is not necessary that the party bound should have known of the usage if he dealt in the market where it prevailed, or authorized his agent to deal there.⁷

An illustration of the extent to which the general law is controlled by the usages of the trade is found in *Gillett v. Mawman*.⁸ G. was a printer. He printed, on

¹ *Anderson v. Pitcher*, 2 B. & P. 168.

² 1 M. & W. 475.

³ S. L. C. 555.

⁴ *Pearson v. Scott*, 9 Ch. D. 198.

⁵ *Wildy v. Stephenson*, C. & E. 3; *Nelson v. Dahl*, 12 Ch. 576.

⁶ *Willans v. Ayres*, 3 A. C. 133.

⁷ *Sutton v. Tatham*, 10 Ad. & E. 27.

⁸ 1 Taunt. 138.

account of M., a translation of Anarchasis. The work was nearly completed when a fire accidentally broke out on G.'s premises, and the whole impression was destroyed. G., when entrusted with the translation, had undertaken to get it insured. Afterwards he effected an insurance in his own name upon property on his premises, but without making any mention of the goods held in trust for M. After the premises were destroyed by fire, G. received the amount of his insurance, which fell considerably short of his own loss. The courts held that no part of this money could be considered as received on account of B., and it could not, therefore, be set off in an action for work and labour brought by G. against M. *Per Lord Mansfield*: "The custom of the trade was fully established. It was proved that the printer, by the general usage, was not entitled to be paid for any part of his work until the whole was completed and delivered. This custom is law of the trade, and as far as it extends it controls the general law."

Parol evidence of the custom of a particular place or trade cannot be given to vary a written contract, or to contradict it, but it may be admitted to explain the terms used or to add a tacitly implied incident. Where a young lady was engaged as an actress for three years, evidence was admitted to show that, by the usages of the trade, the term "three years" in such an agreement meant only the theatrical seasons of the year.¹ Where the term "1000 rabbits" was used in a contract, it was shown that the "1000" meant 1200, according to the custom of the trade. Where the words "on arrival" occurred in a charter-party, evidence was admitted to show that, by the

¹ *Grant v. Maddox*, 15 M. & W. 737.

usage of the port, "arrival" meant going to a particular spot in the port.¹ By mistake a contract note was written as of a sale from A, a broker, to C. A tried to get in evidence that it was the custom of the place to send brokers' contract notes without disclosing the principal's name, but it was rejected, on the ground that it was verbal evidence to contradict a written contract.² Where A and B entered into a written agreement for the sale of an interest in a patent, and at the same time agreed orally that the agreement should not come into force unless C approved of it, the parties interested were allowed to prove that C did not approve of it.³

A glance at these authorities is sufficient to show the state of the law in regard to one established usage of the advertising trade, namely, the letters "U. C.," signifying "until countermanded," which are sometimes written across an advertisement order. The order may authorize the insertion of the advertisement for so many weeks or months, as the case may be, but the inscription of the letters "U. C." written on the face thereof reserves to the advertiser or his representative the option of terminating the order before the expiration of the period. On the authority of the cases above quoted, the writer is of opinion that parol evidence is admissible to show the meaning of the letters "U. C." written on the order. Cases arise, however, where the letters "U. C." are not written thus on the order, but in which the advertiser is led to understand that he has the option of countermanding the order should the results of the advertisement be unsatisfactory. Can oral evidence of this be admitted, where the order

¹ *Norden v. Dempsy*, 1 C. P. D. 654.

² *Magee v. Atkinson*, 2 M. & W. 442.

³ *Pym v. Campbell*, 6 E. & B. 370.

speaks definitely of the insertion of the advertisement for so many weeks or months? Two rules may be laid down. Where one of the terms of an agreement deals specifically with the period during which it is to last, oral evidence is not admissible to vary the document or to contradict it. Such evidence, therefore, will be ruled as inadmissible on the ground that it contradicts a written term in regard to which the document is quite clear. The other rule is that a tacitly implied incident may be proved by verbal evidence where it is consistent with the written terms of the order. If the words "until countermanded" are signified by the letters "U. C." written in full across the order, such parol evidence will be quite consistent with what appears on the face of the contract, and is admissible.

3. WHEN PAYMENTS ARE DUE

As a rule, a properly drawn advertisement order provides for the amount and the period of payment agreed on for the insertion of the advertisement. Where the document contains no reference either to the amount or to the period of payment, evidence of the usages of the trade would be admissible on the point, and the owner of the paper or magazine where the advertisement appeared must charge only what is reasonable. A different question arises where the agreement specifies either the amount of each insertion or the total amount for the series of advertisements, but makes no provision for the period or mode of payment. Can the publisher of the advertisement in such a case sue for any portion of the money before the series is completed? Or must the advertisements appear for the whole period before any money becomes due?

The first question to determine is whether the contract is entire or divisible. If the contract be entire, no money is due till the contract is completed. If, on the other hand, the contract is divisible, payments may be enforced before the series is completed. If A undertakes to shave B and demands payment when he has only shaved one side of B's face, he can recover nothing till he completes the job he has undertaken to do. It has long been laid down that an entire job cannot be apportioned. Where S. claimed £5 for repairing B.'s chandeliers, and B. proved that S.'s agreement was to make the chandeliers complete for £10, judgment was given for B.¹ If, however, the contract or its consideration be divisible, the entire job may be separated into portions, which may be sued upon before the series is complete. R. undertook to put H.'s ship into thorough repair. When he had partly carried out his undertaking, R. demanded payment for what he had done, and refused to complete the work unless he was paid. H. refused to pay him till the whole job was done. The courts held that this was not a specific job for a specific sum, and that there was no undertaking in the contract to make no demand for payment till the work was complete.²

Performance of the whole work is not a condition precedent to the payment of any part of the price unless both price and work are specified. The best illustrations of divisible promises can be found in contracts to receive and pay for goods by instalments. The question to be answered in all these cases is one of fact; the answer must depend on the circumstances of each case. This is substantially the mode in which the Legislature has stated

¹ *Sinclair v. Bowles*, 9 B. & C. 92.

² *Roberts v. Havelock*, 3 B. & Ad. 404.

the problem in the Sale of Goods Acts. Sec. 31 of that statute runs—

“Sec. 31.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

“(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not a right to treat the whole contract as repudiated.”

An order for a series of advertisements is analogous to an order for the supply of goods in the form of advertising space in the columns of a newspaper. It will be noticed that sec. 31 is framed on the assumption that the contract indicates the terms on which the “instalments” (of advertising spaces) are to be supplied or paid for. In each case the circumstances proved at the trial determine the result. Where it is proved that the contract is divisible, *i.e.* where the other party has derived some benefit from the part performance, it is clear that payments may be enforced before the end of the series. The presumption in such cases is that the parties intended payment to keep pace with the accrual of the benefit for which payment was to be made. The most aralogous case to an advertisement order is that of *Lockwood v. Tunbridge Wells Local Board*.¹

¹ Cab. & E. 289.

A, a builder, had contracted to execute certain works for B at Pembury. Defendants, owners of a stone-quarry, agreed to supply A with the stone required in the works. The terms of the contract were: "Supply me with the whole of the Sevenoaks stone required at the Pembury reservoir, the same to be clean, fit for use, and delivered into trucks of the railway company at Sevenoaks at 5s. 3d. per ton." Deliveries were made from time to time, and at the time the action was brought about one-third of the quantity of stone required had been delivered. It was contended for A that the contract was entire, and that payment under it did not become due till its completion. Huddleston, B., saying that the question turned on the intention of the parties, held that B was entitled to payment on delivery for the quantities delivered from time to time.

4. STAMPING OF ADVERTISEMENT ORDERS

Shortly after the passing of the Stamp Act of 1891, the authorities at Somerset House drew the attention of the proprietors of newspapers and magazines to the point that all advertisement orders above the value of £5 may be liable to the 6d. stamp provided for in the first schedule. No legal duty or obligation is imposed on the owner of a newspaper or magazine to put a 6d. stamp on every advertisement order received at his office. The question whether the order bears a stamp or not springs up only when, a legal dispute having arisen between the proprietor and the advertiser, the former wishes to rely upon the order as evidence of the contract. If the document be stamped, and the stamp be an adhesive stamp, it must be cancelled at the time of making the agreement by the

person first signing putting on the stamp his name or initials, or the name and initials of his firm, and the date.¹

If it be not so stamped, the document may be impressed with a stamp at Somerset House, or other Inland Revenue office either before execution or after. If after execution, it must be brought to be stamped within fourteen days from its date, if it bears one, or from its execution if it does not bear the date, or it will not be stamped without payment of the penalty. The penalty is £10; but, if within three months of the first execution of the document, the Commissioners of the Inland Revenue be memorialized, and a good excuse offered for not stamping the document in time, the penalty will be mitigated, though there is hardly ever less than 10s. to pay.²

Sec. 21 of the Stamp Act of 1891 runs—

“Agreement or any memorandum of an agreement made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract or obligatory upon the parties from its being a written instrument, 6*d*.

“EXEMPTIONS.

“(1) Agreement or memorandum, the matter whereof is not of the value of £5.

“(2) Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant.

“(3) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise.

¹ Stamp Act, 1870, sec. 24.

² Powell's "Law affecting Printers," p. 229.

“(4) Agreement or memorandum made between the master and mariners of any ship or vessel for wages, on any voyage coastwise from port to port in the United Kingdom.

“(5) Agreement entered into between a landlord and tenant, pursuant to sub-sec. 6 of sec. 8, or sub-sec. 2 of sec. 20 of the Land Law (Ireland) Act, 1881.

“Sec. 22.—The duty of sixpence upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed.”

The terms upon which instruments, not duly stamped, may be received in evidence are set out in sec. 14—

“(1) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee, of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or the referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.”

It is now settled practice to allow an unstamped document to be used, upon the personal undertaking, not of a party to the action, but of the solicitors who are officers of the court to stamp it and to produce it so stamped before the order of the court is drawn out.¹ If the judge rules that the stamp upon any document

¹ *Re Coolgardie Co., ex parte Fleming*, 1900, 1 Ch. 475.

is sufficient, or that the document does not require a stamp, a new trial will not be granted.¹ If the judge rules that the stamp upon a document is sufficient, no appeal lies against his ruling, even though it should appear to be incorrect.² It is the duty of the judge to reject an unstamped or insufficiently stamped document tendered in evidence, whether counsel take objection to its admissibility or not.³

5. SHOULD ALL ADVERTISEMENT ORDERS BE STAMPED?

Notwithstanding the circular issued by the Somerset House authorities to newspaper proprietors, it is very doubtful whether all the advertisement orders above £5 require a stamp. So far as the words of the charge describe the instrument chargeable, they are taken substantially from the language of 55 Geo. III., c. 184, and the subsequent statutes, and must be interpreted according to the cases decided under those Acts.⁴ Even where the document is not required by law to be in writing, it must be stamped if it comes within the description of the charge—that is to say, if it be “an agreement or any memorandum of an agreement made in England or Ireland under hand only: . . . whether the same be only evidence of a contract or obligatory upon the parties from its being a written instrument.” The general rule on the point was laid down by Parke, B.,⁵ as

¹ Order XXXIX. rule 8; *Mauler v. Ridgeway*, 1898, 1 Q. B. 501.

² *Blewitt v. Trotton*, 1892, 2 Q. B. 627.

³ *Bowler v. Wilkinson*, 5 T. L. R. 382.

⁴ Alpe's “Law of Stamp Duties,” p. 52.

⁵ *Beeching v. Westbrook*, 8 M. & W. 414.

follows: "A stamp is not imposed by the Act upon every document which refers to, and so furnishes evidence to prove, a contract; it is required only on documents in which the parties put down the terms by which they intend to be mutually bound."

The cases cited below establish two rules in regard to stamping applicable to advertisement orders: (a) a proposal accepted orally need not be stamped;¹ (b) a document or letter containing the terms of agreement already made must be stamped.² An order for the insertion of advertisements above the value of £5 requires to be stamped (a) when it is signed after the advertiser has discussed terms with the canvasser; or (b) when the order is signed in response to a letter or application. The order need not be stamped (a) when the advertiser, on his own initiative, requests the newspaper to insert the advertisement, and his proposal is tacitly accepted by the insertion of the advertisement; or (b) when the advertisement order comes in the form of a proposal from the canvasser, and is orally accepted by the advertiser. A written proposal to let land on certain terms accepted by parol is not an agreement nor a minute or memorandum of agreement.³

A letter purporting to allot shares in terms differing from those of the letter of application was held admissible without a stamp, on the ground that the letter of allotment was a new proposal.⁴ Letters offering the term of an engagement to an actor who accepted the terms by

¹ *Drant v. Brown*, 3 B. & C. 669; *Hudspeth v. Yarnold*, 9 C. B. 625; *Doe d. Bingham v. Cartwright*, 3 B. & Ald. 326.

² *Knight v. Barber*, 16 M. & W. 66.

³ *Drant v. Brown*, 3 B. & C. 669.

⁴ *Vollans v. Fletcher*, 16 L. J. Ex. 173.

parol, were admitted unstamped.¹ A prospectus (*e.g.* of a school) containing terms which were accepted by parol need not be stamped, being a proposal only.² But where the letters or documents are written so as to contain the terms of a contract already made between the parties, a stamp is required, though only signed by one of them.³

An agreement consisting of several letters may be proved under one stamp, the letters being those written while the contract is being made.⁴ The stamp may be on any letter of the series, but it should be on an original document, not a copy.⁵

6. STAMPING OF OTHER ADVERTISING CONTRACTS

The stamping of advertising contracts other than advertisement orders has been materially affected by the decisions of the Court of Appeal in such cases as *Jones v. the Commissioners of Inland Revenue*,⁶ and *The National Telephone Co. v. the Commissioners of Inland Revenue*.⁷ Specimens of these contracts are to be found in the "Encyclopædia of Forms and Precedents,"⁸ so far as they deal with two rights secured by contract: (*a*) the right to affix advertisements on another's property; (*b*) the advertisement of another's property. Neither a notice inviting tenders for the exclusive right to use the cars or carriages of a tramway or railway company for advertising

¹ *Hudspeth v. Yarnold*, 9 C. B. 625.

² *Edgar v. Blick*, 1 Starkie 464; *Clay v. Crofts*, 20 L. J. Ex. 361.

³ *Knight v. Barber*, 16 M. & W. 66.

⁴ *Beeching v. Westbrook*, 8 M. & W. 411.

⁵ Alpe's "Law of Stamp Duties," p. 53.

⁶ 1895, 1 Q. B. 484.

⁷ 1899, 1 Q. B. 250; 1900, A. C. 1.

⁸ Vol. i. p. 229.

purposes, nor the conditions of tender annexed thereto, requires a stamp, but the contract form which is often attached to the conditions must, when it is duly filled up as accepted, be stamped at the rate of 2s. 6d. per £5 of the total amount of the first quarterly payment and 10s. in addition. The words of the second schedule of the Stamp Act of 1891, which render such agreements chargeable, are as follows:—

“Bond, covenant, or instrument of any kind whatsoever—

“(1) Being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except on a superannuation security) or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack.

“For a definite and certain period, so that the total amount to be ultimately payable can be ascertained. (The same *ad valorem* duty as a bond or covenant for such total amount.)

“For the term of life or any other indefinite period—

“For every £5 and also for any fractional part of £5 of the annuity or sum periodically payable, 2s. 6d.”

The cases decided point to the conclusion that all instruments of whatever description, containing a binding promise to pay an ascertained sum of money at stated periods, which are not chargeable with *ad valorem* duty under the title Conveyance, or Lease, or Mortgage, are liable to either the primary or auxiliary duty (as the case may be) under this title.

In *Jones v. the Commissioners of Inland Revenue*,¹ A had entered into an agreement under seal with B, a

¹ 1895, 1 Q. B. 484.

telephone company, for the supply of means of telephonic communication. A covenant to pay, by quarterly instalments in advance, for the use of the telephone lines and apparatus and the telephone communication, the annual sum of £11 5s. per line, the minimum amount to be payable being calculated on the rent of forty-five lines, viz. £506 5s. The agreement was to continue in force for ten years, and thereafter from year to year, determinable by either party on three months' notice at the end of the tenth or any subsequent year. The question was, Was the agreement an "instrument" chargeable with bond, etc., only under sub-sec. 1 as securities for the payment of annual sums for a certain period? It was contended that the word "security" meant something auxiliary to a prior obligation, but the Divisional Court decided that the agreement was chargeable. Wright, J., expressed the view that "the word 'security' as used in these schedules does not mean, as in popular language, some obligation which is auxiliary to a prior obligation, but means any obligation created by any instrument." The same decision was given in *The Sweetmeat Automatic Co. v. the Commissioners of Inland Revenue*,¹ and in *Clifford v. the Commissioners of Inland Revenue*.² Finally, in *The National Telephone Co. v. the Commissioners of Inland Revenue*,³ the House of Lords settled the point beyond question. An agreement under hand only for the hire of a private telephone wire for the sum of £12, payable yearly in advance, was held chargeable under the section.

One authority⁴ expresses the opinion that a contract

¹ 1895, 1 Q. B. 484.

² 1896, 2 Q. B. 187.

³ 1899, 1 Q. B. 250; 1900, A. C. 1.

⁴ M. Underhill, general editor of the "Encyclopædia of Forms and Precedents."

between a railway company and an advertiser or advertisement agent, conferring the right to exhibit advertisements in the company's stations, requires a stamp at the rate of 2s. 6d. per £5 of the annual rent. According to the same authority, the stamp on nearly all these advertising contracts will be at the rate of 2s. 6d. per £5 of the first periodical rent, whether annual, quarterly, monthly, or otherwise; but the fact that what is in substance a yearly rent is payable by instalments, quarterly or otherwise, will not make the duty payable on the first instalment only. An additional stamp of 10s. will be necessary where the first periodical rent may be exceeded by an uncertain amount.¹ In cases where the agreement is for a term certain (and is not to continue after the term until determined by notice) so that the total amount payable under the contract can be definitely ascertained, the agreement must be stamped *ad valorem* as a mortgage.

7. STAMPING OF INSURANCE COUPONS

Under sec. 118 of the Stamp Act of 1870, the penalty of £20 is imposed on every person who "makes, executes, or delivers out or pays, or allows in account, or agrees to pay or allow in account, any money upon or in respect of any policy which is not duly stamped." When newspapers adopted the practice of issuing free insurance coupons against injury in railway or other accident, they brought themselves within the provision; and in the Revenue Act of 1889 provision was made for the compounding of the stamp duties on the lines secured for the Railway Passengers Assurance Co., and the Ocean,

¹ *Jones v. the Inland Revenue Commissioners*, 1895, 1 Q. B. 484.

Railway, and General Accident Co., by two private bills. Under the amending Act of 1891, the Commissioners of Inland Revenue may enter into an agreement for the compounding of the stamp duties by means of a quarterly payment of a lump sum by way of composition for such duty.

CHAPTER IV

THE RATING OF ADVERTISING STATIONS

THE Advertising Stations (Rating) Act of 1889 dealt with the problem of who was the right person to be rated for land occupied or unoccupied, but used for advertising purposes; and, secondly, with the power of local authorities to regulate structural advertisements. At common law, the power of putting up hoardings in highways without any licence from the local authority still exists.

A householder may of right, according to the proposition laid down in one case,¹ put up temporary hoarding during the repairs of his house, although it projects into the roadway, though this right is subject to the limitation that any excess or abuse of it may amount to a nuisance. The inability of a local authority to restrict this common-law right was settled in a case as far back as 1870.² Under the City of London Sewers Act, 1848, persons about to build or pull down a house could be licensed by the Commissioners to erect a board or fence, the name of the street and the purpose for which the hoarding was to be made to be mentioned in the licence. A person who was about to erect a large building that would take two years to build, applied for a licence to erect a hoarding. As a

¹ *Fisher v. Prowse*, 2 B. & S. 770.

² *Reg. v. the Commissioners of Sewers for the City of London, ex parte Brass*, 22 L. T. N. S. 582.

condition of granting the licence, the Commissioners stipulated that no placards or other materials for advertising purposes should be placed against the hoarding. The Court held that the Commissioners had no right to impose conditions prohibiting the placing of advertisements on the hoarding.

Whilst it is true that the statute of 1889 does not make property rateable which was not rateable before, it has solved many points that had arisen as to whether the advertising contractor was liable to be rated. In the law of rating, it is not the place but the occupier that is rated. Almost every case turned mainly on two points: (1) Were the advertisement hoardings so fixed to the soil as to come within the legal definition of "land"? and (2) if so, were the parties exhibiting the advertisements occupiers in the legal sense of the term, or merely licencees? In order to bring the advertisement hoarding within the definition of a structure, it was necessary to show that the hoardings had a firm foundation in the soil, so as to render them, for so long as the materials of which they were composed would naturally last, a part of the land not removable without digging up or the loosening of their foundations thereon. The first point arose in *Reg. v. St. Pancras Assessment Committee*.¹ A suburban villa was occupied by a caretaker. In front of the house a dwarf wall was surmounted by iron railings. In front of the wall and railing a framework of wood was fixed expressly for the purpose of advertising. W. paid a yearly payment to rent the hoardings for advertising purposes, and such hoardings were fixed, but not in such a way as to necessitate any disturbance of the soil if they were removed, or as to indicate any intention on the part of the owner that there

¹ 2 Q. B. D. 581.

should be a permanent occupation of any part of the land by the person erecting the hoarding. It was held that such a person was not rateable as occupier of an advertising station, and that his name was therefore wrongly inserted in the valuation list.

The second point was raised two years before the passing of the Act, in *Taylor v. Pendleton*,¹ which decided that if it could be shown that the person who used land for advertising purposes was in occupation of the land, then he was rateable for such occupation. The test is whether the advertising agent is merely a licensee, or has he the right to exclude others, including the owners of the land, from interfering with his possession? A landowner agreed to let an advertising station at a yearly rent to an advertising agent, who agreed to pay the rates and taxes. By another agreement the landowner agreed to allow the agent to erect an ordinary hoarding, for which the agent was to pay a yearly rent. The first agreement was limited to seven years, and the second to three years. The hoardings were supported by posts fixed into the ground. In one instance the structure was used partly by the owner as a shed and partly by the advertising agent as a hoarding; in the second instance, the structure was used exclusively by the agent as a hoarding. It was held that each of the agreements created a tenancy and conferred an exclusive occupation, and not merely a licence, and therefore the advertising agent was liable to be rated to the relief of the poor in respect of both hoardings as occupier of an advertising station.

Two years later the Act was passed with the object, to quote the preamble, of removing the difficulties which had arisen as to the right person to be rated for occupied or

¹ 19 Q. B. D. 288.

unoccupied land used for advertising. In addition to secs. 3 and 4, which deal with the principal object of the bill, sec. 5 controls the manner of exercising the licences issued by the local authority to (a) erect hoarding in roads, (b) to use such hoarding for advertising. Two cases of the use of land for exhibition of advertisements are dealt with in secs. 3 and 4. Sec. 3 deals with land not occupied, and therefore not rateable, upon which advertisement hoardings have been erected; sec. 4 deals with the user of hereditaments which are occupied, and therefore rateable. The person who is to be assessable in each case is indicated as follows:—

“Sec. 3.—Where any land is used permanently or temporarily for the exhibition of advertisements or for the erection of any hoarding, frame, post, wall, or structure used for the exhibition of advertisements, but not otherwise occupied, the person who shall permit the same to be so used, or (if he cannot be ascertained) the owner thereof shall be deemed to be in beneficial occupation of such land or part thereof, and shall be rateable in respect thereof to the relief of the poor and to all local rates, according to the value of such use as aforesaid.

“Sec. 4.—Where any land or hereditament occupied for other purposes, and rateable in respect thereof to the relief of the poor and local rates, is used temporarily or permanently for the exhibition of advertisements, or for the erection thereon or attachment thereto of any hoarding, frame, post, wall, or structure used for the exhibition of advertisements, the gross and rateable value of such land or hereditament shall be so estimated as to include the increased value from such use as aforesaid.”

Two years after the passing of the Act the first case under it was tried.¹ C. was a contractor for the erection

¹ *Chappell v. the Overseers of St. Botolph*, 1892, 1 Q. B. 561.

of buildings upon land vested in the Postmaster-General. He put up a hoarding round the land on which the buildings were to be erected, and, in pursuance of a clause in the contract permitting the use of the hoarding for advertising purposes, let the hoarding to a firm of advertising contractors. The hoarding was erected upon the public street under a licence granted by the Commissioners of Sewers. It was held that the hoarding had been erected upon "land not otherwise occupied" within the meaning of sec. 3, that C. was the person who had "permitted" the land to be used for the exhibition of advertisements within the meaning of that section, and that he must, therefore, be deemed to be in beneficial occupation of the land. This decision has been discussed and questioned by an authority,¹ who points out that C. was not the owner of the hoarding, the hoarding was not put up by him, it was not fixed to the soil, nor was the land on which it stood in his occupation or, in fact, occupied at all, for it was in the public street. He puts the following hypothetical case: Suppose A owned the hoardings and permitted B to use them for advertisements, and B permitted C, and C again permitted D, and D actually used the hoardings for advertisements. Are A, B, C all rateable, or only B?

Each case must be decided on its particular facts. In *Burton v. St. Giles' and St. George's Assessment Committee*,² A, who was putting up certain buildings erected certain hoardings, and B, under agreement with A, used the hoardings for the exhibition of advertisements. It was a term of the agreement that the contract should not give B any interest in the premises upon which the advertising station was to be erected, or in any way make him liable for

¹ 56 J. P. 243.

² 1900, 1 Q. B. 389.

rates or taxes during the continuance of the agreement. B's name was inserted in the valuation list as being the rateable occupier of the hoardings under sec. 3. B contended that he was not in the exclusive occupation of the advertising station or the hoardings, and that he did not "permit" the land upon which the hoardings were erected to be used for the exhibition of advertisements. Was he, by virtue of sec. 3, to be deemed to be in beneficial occupation of the land on which the advertising station and the hoardings were erected? It was held that he did not "permit" the land to be so used, and could not be deemed the beneficial occupier.

In *Shelley v. Dillon*¹ an advertisement contractor had, by permission of the occupier of a field, erected a hoarding on the wall of a field, and used the hoarding for the purposes of advertising. It was held that the occupier of the field, and not the contractor, was the person to be rated under sec. 4.

Sec. 5 runs:—"Where, under any power vested in them by any local or general Act, any corporation, board, vestry, urban sanitary or other authority, shall grant a licence for the temporary erection of any board, gantry, scaffold, or other structure, upon or over any part of any public highway, or upon or over any lands or hereditaments the property of such corporation, board, vestry, urban sanitary or other authority, such corporation, board, vestry, sanitary or other authority, may include in such licence a condition or conditions prohibiting the affixing of any advertisement to any such board, gantry, scaffold, or other structure, or sanctioning the affixing of advertisements thereto upon payment of such sum, and on such conditions as the corporation, board, vestry, sanitary or other

¹ 30 L. R. Ir. 304.

authority granting the licence may determine. And any person using any such board, gantry, scaffold, or other structure, otherwise than as permitted by such licence, shall for every offence be liable to a penalty not exceeding five pounds, and a further sum not exceeding forty shillings for every day during which such offence shall be continued after notice in writing to discontinue such use shall have been given to such person by such corporation, board, vestry, sanitary or other authority, which penalties may be recovered in a summary way by such corporation, board, vestry, sanitary or other authority.

“The amount of any payments received or penalties recovered under this section shall be applied by the corporation, board, vestry, sanitary or other authority receiving the same in aid of the rate levied for the repair of the highway.”

Whilst giving power to the local authority to prohibit advertisement hoardings, sec. 5 leaves untouched the non-rateability of the licensee, who is no more rateable under the Act than he was before. One of the first points to determine in these cases is, Is it merely a licence, or is it an exclusive interest?

“An exclusive licence is a leave to do a thing, and a contract not to allow any one else to do the thing; but unless coupled with a grant, it confers, no more than any other licence, any interest or property in the thing, and the licensee has no title to sue in his own name.”¹ The “free and uninterrupted use of a garden-wall,” by T., the owner, in return for monthly payments to P., an advertisement contractor, for the display of a frame of advertisements, although expressed in the agreement “not to be a lease,” amounts to a personal covenant that T. would

¹ *Heap v. Hartley*, 42 Ch. D. 461.

not interfere with P.'s enjoyment.¹ A contract giving an exclusive right to advertise and let spaces for advertisements in certain parts of a theatre does not confer "an interest in land" which could form the subject of compensation under the Lands Clauses Consolidation Acts.²

An advertisement hoarding in a field on a hedge-bank running parallel to a street, a strip of land between the hoarding and the street, varying from 2 feet to 3 feet 4 inches in width, does not "abut on the street."³ Advertisement cases illuminated by electric light, and fixed upon the front walls of a building, and projecting 10 inches beyond the building line but less than an existing cornice which was 2 feet beyond the building, are not "structures" within the meaning of sec. 22 of the London Building Act of 1894.⁴ Letters fixed to an iron trellis supported on a pallisade which surmounted one of the end walls of a large building, the dome of which was some 30 feet higher than and separated from these letters, are not a sky sign within the meaning of 54 & 55 Vict. c. 78.⁵ A wooden case attached to the external wall of a building by iron brackets, and used as an advertisement sign, is not a projection within the meaning of sec. 73, sub-sec. 8 of the London Building Act, 1894, which applies only to projections forming part of the building from which they project.⁶

Posters fixed to a hoarding with the consent of the owner of the hoarding are property, and a person who tears them

¹ *Tunmer v. Partington Advertising Co.*, 68 J. P. 319.

² *Frank Warr & Co. v. the London County Council*, 1904, 1 K. B. 713; *Daly v. Edwardes*, 17 T. L. R. 115.

³ *Barnett v. Lovell*, 68 J. P. 93.

⁴ *The London County Council v. the Illuminated Advertising Co.*, 68 J. P. 445.

⁵ *Tussaud v. the London County Council*, 57 J. P. 185.

⁶ *Hull v. the London County Council*, 1901, 1 Q. B. 581.

down defaces them, and may be convicted under 24 & 25 Vict. c. 97, s. 52.¹ A wooden stand outside a club house, which obstructs a neighbour's view, is a mere amenity which cannot be protected.² Scattering from a van over the roadway printed bills advertising a performance at the theatre may amount to "throwing or allowing any litter" in a thoroughfare under sec. 60 of the Metropolitan Police Act, 1839; but it is a question of fact for the magistrate in each case to decide whether such paper was "litter" or not within the meaning of the section.³

A curious point arose in the case of the *Partington Advertising Co. v. Willing & Co. (Limited)*,⁴ heard by Kekewich, J., in 1896. By an agreement dated March 22, 1895, R., the owner of certain premises in the Strand, which had been pulled down and cleared for a new building then in progress, let the hoarding, which extended over part of the public street, to P., at a rent of £8 a month, for advertising purposes. Thereupon, on March 28, P. took possession of the hoarding, printed up their name, and prepared to display their posters and advertisements thereon. On the same day the builders let the hoarding to W. for advertising purposes, whereupon the next day, March 29, W. proceeded to post their bills over P.'s. P. had not obtained any licence for advertising, under sec. 5 of the Advertising Stations (Rating) Act, 1899, but W. had done so, though not till after putting up their posters. The building agreement between R. and the builders contained this clause: "The hoardings are not to be let for advertising, nor are any bills, placards, or

¹ *R. v. Milvain*, 1 T. L. R. 159.

² *Foli v. the Devonshire Club*, 3 T. L. R. 760.

³ *Hills v. Davies*, 67 J. P. 198.

⁴ 12 T. L. R. 176.

notice-boards, of any kind or description, to be placed upon the hoardings, fans, etc." Kekewich, J., held that the hoarding belonged not to the building owner, but to the builders. The clause in the agreement bound the building owner and the builders as between themselves, and when the builder let the hoarding to some one else, he did so subject to the claim of the building owner to enforce his agreement by an action for damages. If the case stopped at P.'s want of title, the only thing to do would be to dismiss the case with costs. But there was an infirmity in W.'s title also, for W. had taken possession of the hoarding before the date of their licence, and they had just as much title to it as P., which was none at all. Neither P. nor W. was in the right, and he dismissed the action without any order as to costs.

CHAPTER V

ADVERTISING SCHEMES AND THE LOTTERY AND BETTING ACTS

1. LOTTERY ADVERTISEMENTS.

SCHEMES adopted by advertisers for popularizing their wares sometimes involve competitions which are closely akin to the gaming and lottery schemes prohibited by law. Of the numerous Acts of Parliament passed between 1699 and 1846 for the suppression of lotteries, fourteen are still in existence, and five contain provisions relating to the advertising of lottery schemes. Lotteries were declared nuisances by 10 & 11 Wm. III., and that statute was followed by 9 Geo. I. c. 19, which imposes a penalty of £200 for setting up any lottery by virtue of a grant from any foreign prince, or issuing any advertisements relating to the same. It has been decided that this statute only applies to lotteries in this country.¹ By 12 Geo. II. c. 28, the same penalty was imposed for setting up sales by lotteries or for advertising for advances of sums of money "to be distributed by way of lottery." Any person publishing any scheme for the sale of tickets in any lottery authorized by any foreign potentate or to be drawn in any country is liable, under sec. 60 of 4 Geo. IV. c. 41, to a fine of £50 and to be dealt with as a rogue and vagabond; and 6 & 7 Wm. IV. c. 66 imposes a penalty of £50 on any person who prints or publishes any advertisement or other notice relating to the drawing of any foreign or other lottery

¹ *MacNee v. Persian Investment Corporation*, 44 Ch. D. 306.

not authorized by Parliament; and the same penalty is imposed for printing advertisements of the sale of tickets or chances in any lottery. With the view of saving newspaper proprietors the annoyance of being sued for inadvertently advertising lotteries, provision is made by 59 Vict. c. 74 for (1) staying judicial proceedings on certain conditions; (2) preserving half the penalty imposed for the Crown; and (3) instituting proceedings in the Attorney-General's name.

In nearly all the cases cited hereafter a good deal of discussion has arisen as to the legal definition of a lottery. More than one learned judge have accepted Johnson's definition as a "distribution of prizes by lot or chance," but this, as Mr. Stutfield points out,¹ is obviously incomplete, since it does not exclude the case of provident and building societies where the distribution of shares as dividends or profits is settled by lot or chance. Other elements must be added to the definition. Not only must the distribution of prizes be by lot or chance, but it must be connected with a fund where (a) the shares do not represent the contribution of recipients, or (b) the subscription of shares to the fund must be made for the purpose of dividing the fund between them by chance and unequally. A company or partnership which distributes dividends or profits by drawing lots stands on a different footing, for although the distribution is by chance it is not unequal. One authority² suggests the following test of a lottery: There must be an agreement or scheme contemplating that, in consideration of subscriptions paid by the adventurers, certain property (be it the fund subscribed or otherwise) is to be allotted to

¹ Stutfield's "Law Relating to Betting," 3rd ed., p. 128.

² *Ibid.*, p. 141.

some one or more exclusively of the other adventurers, or distributed unequally among them; such allotment or distribution to be determined by lot. But (a) agreement may be among the subscribers themselves, as in the case of a sweepstakes, or by the subscribers, with a person who is getting the lottery up, perhaps for his own profit; (b) it must be part of the scheme that some of the adventurers should win and others should lose; (c) the distribution of the prizes must be by lot or chance, differing from a wager; (d) the distribution of the prizes must be in consideration of property subscribed by the adventurers out of property belonging to them individually; (e) the distribution of the prizes by lot must be the main substantial part of the scheme to which the adventurers subscribe. The value of this test is seen when the decided cases are considered. Several cases pertain to the class of lottery sales, or ordinary business transactions with which lotteries are associated for the purpose of attracting the attention of the public. In *Taylor v. Smetten*¹ packets of tea were sold in a tent, each packet containing a coupon entitling the purchaser to a prize later on. The tea was good and worth the money paid for it, but the prizes varied in character and value. Hawkins, J., decided that the purchaser bought the tea coupled with the chance of getting something of value by way of a prize, but without the least idea what the prize might be. "What he got he got as the result of mere chance or accident." The proceedings therefore amounted to a lottery. The case of *Hunt v. Williams*² differed from *Taylor v. Smetten* in that there was no advertisement or announcement in the former of what the packets sold contained, whereas in the latter the trader announced that the packets contained a

¹ 11 Q. B. D. 207.² 52 J. P. 821.

prize coupon. It is interesting to compare these cases with *Caminada v. Hulton*,¹ where a scheme of attaching prize coupons to the article sold was held to be no lottery. To increase the sale of a publication, the defendant appended to each copy a coupon, which the purchaser might if he chose fill up with the names of the horses he thought likely to win one or more races. Certain conditions were set forth, and the persons successful in selecting a given number of winners were entitled to a prize. On the point as to whether the competition was a lottery, the judges held that as the competitors selected their own horses, there was no distribution by lot, and therefore there was no contrivance to obtain money by chance. To constitute a lottery, it is necessary that the result of the competition must depend entirely, and not merely partly, on chance. The question was discussed by A. L. Smith, L.J., in *Hall v. Cox*,² where a newspaper had offered £1000 to the reader who predicted the correct number of births and deaths in London in a given week. A clear distinction was there drawn between competitions which depended largely, but not entirely, on chance, and competitions where the result rests wholly and entirely on chance. The skill necessary to investigate statistical tables so as to gather the probable number of births and deaths was held to exclude the case from lottery competitions. In the "missing-word" competition the same distinction had been drawn. Stirling, J., discussed the subject at length in *Barclay v. Pearson*,³ where a newspaper published a paragraph from which the last word had been omitted, and invited the readers to cut out a coupon and fill in the missing word. It

¹ 60 L. J. M. C. 116.

² 1899, 1 Q. B. 199.

³ 1893, 2 Ch. 155.

appeared that the word to which success attached was not fixed until after all the coupons had been sent in, and was then chosen by selecting from a bag one of twenty or thirty pieces of paper, on which had been written words which were more or less appropriate solutions. Readers were asked to supply "the word," and not "a word," and as the selection of the word was a matter of chance, the competition was held to be a lottery.

The legal relations of English promoters to foreign lotteries are discussed by Chitty, J., in *MacNee v. Persian Investment Corporation*.¹ In that case a company had been formed to acquire and work a concession conferring the exclusive privilege of conducting all operations in connection with lottery loans in Persia. A shareholder, contending that the enterprise was in contravention of the Lottery Acts, sought to restrain the company from carrying out the scheme. Mr. Justice Chitty, however, held that the proposed purchase of the concession was not unlawful, since the company were not attempting to erect or set up any lottery in this country within the meaning of 9 Geo. I. c. 19, s. 4. That learned judge made it perfectly clear that there is nothing in the Lottery Acts to prevent two Englishmen in this country, British subjects, from putting together a fund for the purpose of employing that fund in erecting a lottery in a foreign state where foreign lotteries are lawful. As to 6 & 7 Wm. IV. c. 66, which was passed to prevent the advertising of foreign and other illegal lotteries, Chitty, J., declined to hold that a prospectus was within the general words at the end of the section—"any advertisement or other notice of or relating to the drawing or intended drawing of any foreign lottery." A mere general statement as to the number of

¹ 44 Ch. D. 307.

annual issues in Persia and the minimum drawings, which was in effect what the prospectus amounted to, was in the opinion of the judge not an advertisement or notice of such lottery within the meaning of the section.

Lottery Sales illegal if Right to Prizes be ascertained by Chance.—H.,¹ a hawker of watches, announced what he called the “Eastern Bazaar,” to be conducted “according to the principle of the Art Union.” There were to be 5000 tickets of 1s. each, and in the prospectus it was stated that bonuses “to the amount of £250 were to be distributed.” The chief “bonuses” consisted of eight articles, either clocks or watches, varying in value from £12 to £2. The other “bonuses” were so arranged that every subscriber obtained something. Every person who paid 1s. obtained a ticket, with a distinguishing number, on presenting which reference was made to a book, and the holder was informed of the “bonus” he had obtained. H. was indicted for keeping a lottery. The jury found him guilty, and they also found that the subscribers did not in all cases obtain full value for the shilling. *Per M. Smith, J.*: “Whether the full value of the shilling was or was not received by the subscribers, the case comes equally within the mischief against which the Act prohibiting lotteries was directed, inasmuch as the subscribers were induced to part with their money in the hope of obtaining not only their alleged shilling’s worth, but something of much greater value, the right to which was to be ascertained by chance.”

Distribution of Presents at a Sale amounts to Lottery.—M.² gave a musical entertainment, to which admittance was

¹ *Reg. v. Harris*, 10 C. C. C. 352.

² *Morris v. Blackman*, 28 J. P. 199.

obtained by tickets sold at a shop kept by J. After the entertainment, at which M. was assisted by J., M. distributed a number of presents to persons occupying numbered seats, who had paid a sum of money for admission generally to the room. Held to be a lottery within sec. 2 of the 45 Geo. III. c. 49.

Where the Prizes given at a Sale are the Result of Mere Chance or Accident, the Transaction is a Lottery.—T.¹ erected a tent in which he sold packets, each containing a pound of tea, at 2s. 6d. a packet. In each packet was a coupon entitling the purchaser to a prize, and this was publicly stated by T. before the sale, but the purchasers did not know until after the sale what prizes they were entitled to, and the prizes varied in character and value. The tea was good, and worth the money paid for it. Held, that what T. did constituted a lottery within the meaning of the statute. *Per Hawkins, J.*: “Nor can it be doubted that, in buying a package, the purchaser treated and considered it as a purchase of the tea and the coupon, whatever its value might turn out to be. In other words, he bought the tea coupled with the chance of getting something of value by way of a prize, but without the least idea what that prize might be. In making his purchase he exercised no choice. What he got he got without any option or action of his own will, but as the result of mere chance or accident.”

Absence of Advertising in Lottery Sale renders the Transaction none the less Illegal.—H.² kept a sweet-stuff

¹ *Taylor v. Smetten*, 11 Q. B. D. 207.

² *Hunt v. Williams*, 52 J. P. 821.

shop, and sold penny packets of American caramel. Some of the packets sold contained, in addition to the sweetmeats, a halfpenny, and some two halfpence. All the packets contained a fair pennyworth of sweetmeats, but there had been no advertisement or announcement of any kind that money was so contained. Held, that H. was rightly convicted for keeping a lottery within the meaning of 42 Geo. III. c. 119, s. 2, and 5 Geo. IV. c. 83, s. 21. *Per curiam* (Wills, J., and Grantham, J.): "We think it can make no difference that there was no advertising of these prizes, for the fact might become equally well known without advertisement."

Coupons bearing Guesses no Contrivance to obtain Money by Chance, and therefore no Lottery.—H.¹ published weekly a sporting handbook, giving a list of horse-races coming off. Added to the paper was a blank coupon, inviting the purchaser to name six, five, or four winning horses, and return the coupon; if he guessed rightly, a prize was to be given according to number of guesses. There was no regular office for the sale of the paper, but it was obtained chiefly through newsagents. C., a detective inspector, summoned H. for committing an offence under the Betting-House Act, 16 & 17 Vict. c. 119, and under the Lotteries Act (Geo. IV. c. 60, s. 41), and under 37 Vict. c. 15, s. 3. It was contended on behalf of C. that the transaction of purchasing the handicap-book was an invitation of persons by advertisement exhibited and published in the book to take a share in connection with a lottery contrary to statute. The magistrate dismissed the summons, and Day, J., and Lawrance, J., upheld his decision. *Per Day, J.:*

¹ *Caminada v. Hulton*, 60 L. J. M. C. 116.

"This was not the case of a lottery, there being no contrivance to obtain money by chance. It has been contended that the purchaser of one of these books makes a bet when he returns a coupon, stating that he has backed six horses; but I am unable to see how it is a bet. The purchaser of one of these books, even if not successful in guessing the right horse, loses nothing. Moreover, the house or office where the books are sold is not a betting office, but only a newspaper office. There is difficulty in gaining a prize, but nothing to show how there is anything like ordinary betting."

Missing-word Competition a Lottery.—P.,¹ who was the proprietor of a newspaper, carried on in its columns a missing-word competition. He published in his paper a paragraph omitting the last word. In the same paper he printed a coupon, with a direction that persons wishing to enter the competition must cut out the coupon, fill in the word missing from the paragraph, together with their names and addresses, and send it, with a postal order for 1s., to the office of the paper. It was further stated in the paper that the missing word was in the hands of a chartered accountant, enclosed in a sealed envelope; that his statement with regard to it would appear with the result of the competition in a subsequent issue of the paper; and that the whole of the money received as the entrance fees would be divided equally amongst those competitors who filled in the missing word correctly. In an action by B. and other successful competitors against P. and the unsuccessful competitors, seeking administration of the trusts of the moneys in the hands of P. for the purposes of the competition and distribution

¹ *Barclay v. Pearson*, 1893, 2 Ch. 155.

among the persons entitled thereto:—Held, (1) that the competition constituted a lottery within the meaning of 42 Geo. III. c. 119, and was illegal; (2) that so far as the money in the hands of P. was impressed with any trust, it was one which had arisen out of an illegal transaction, and the Court would not render any assistance in its administration; and *semble*, (3) that notwithstanding the illegality of the competition, the competitors had a legal right, enforceable by an action at law, to the return of their contributions at all events, provided that they gave notice of their claim before the money had been distributed by P.

Results of Lottery must depend entirely on Chance, or the Proceeding not Illegal.—C.¹ published a newspaper, *The Rocket*, which offered a prize of £1000 in a competition. The conditions of the competition stated that according to the Registrar-General's returns, the number of births and the number of deaths in London during the week ending December 12, 1896, were—births (males) 1342; (females) 1213; deaths, 1539. A prize of £1000 was offered by the *Rocket* for a correct prediction of the numbers of male and female births, and the number of deaths in London during the week ending December 11, 1897. A competitor was to fill in a voucher, published with the issue which contained the offer, with the number of births (male and female) and of deaths predicted, in spaces left blank for the purpose, and to send the voucher so filled in, together with a coupon cut from the front page of the *Rocket*, to the office of that paper. H. claimed that a voucher sent in by him had fulfilled all the conditions for the prize of £1000, and that the figures filled

¹ *Hull v. Cox*, 1899, 1 Q. B. 199.

in were correct according to the return subsequently issued by the Registrar-General. At the trial the jury passed a verdict for H., but, C. then raising the point that the competition was a lottery, Lawrance, J., directed judgment to be entered for C. Held (in the Court of Appeal), that the competition, not being one the result of which depended entirely on chance, was not a lottery. *Per* A. L. Smith, L.J.: "The result no doubt depends largely on chance, but not entirely, and the cases show that to constitute a lottery it must be a matter depending entirely upon chance. There is an element of skill in the inquiry in this case, dependent on the investigation of the returns for previous years, and the consideration of the increase of population and death-rate and such-like statistical investigations."

To acquire the Right of conducting Lottery Loans Abroad is Lawful, since it does not erect or set up any Lottery in England.—P.¹ was a company, of which M. was a shareholder, formed to acquire and work a concession conferring the exclusive privilege of conducting all operations in connection with lottery loans in Persia. The prospectus referred to the profits made on the continent by lotteries, and stated that the operations of the company would be conducted upon the lines adopted by European States where Government lotteries were in vogue, and that "at least five issues have to be made annually in Persia, with minimum drawings of £10,000, and it is estimated that these operations should return continuously increasing dividends." The company had agreed to purchase this concession. M. as a shareholder commenced an action to restrain the company from acquiring and from publishing

¹ *MacNee v. Persian Investment Corporation*, 44 Ch. D. 306.

any prospectus or scheme relating to the acquisition of this concession, and from publishing any advertisement or notice in any manner relating to such lottery loans, and from applying the funds of the company in the purchase of the said concession, on the ground that the enterprise of the company was illegal and in contravention of the Lottery Acts. The action failed. *Per Chitty, J.*: "The illegality alleged is illegality under the Lotteries Acts, and the only Act that counsel for the plaintiff has been able to point to as being the Act which makes the contract illegal is 9 Geo. I. c. 19, s. 4. The words principally relied on were 'erecting, setting up, constructing, keeping or using, or procuring to be erected or set up.' The company by virtue of its contract do not propose to set up any lottery in this country; . . . the Act of Parliament is unquestionably directed against the erection of lotteries in this country. The legislature of Great Britain of that day did not intend to exercise any jurisdiction over lotteries in foreign countries, kept and carried on exclusively in foreign countries; and there is nothing in this Act, nor indeed in any of the Acts that I have been referred to, which would prevent two Englishmen in this country, British subjects, from putting together a fund for the purpose of employing that fund in erecting a lottery in a foreign state where foreign lotteries are lawful.

2. BETTING ADVERTISEMENTS.

Apart from the Betting and Loans (Infants) Act of 1892 (55 Vict. c. 4, s. 1), which makes it a penal offence to send betting advertisements to infants,¹ certain classes of advertisements are prohibited by the Gaming Act of

¹ See Chapter X.

1853 and the Amending Act of 1874. The first section of the principal statute created two offences: (a) keeping a house for the purpose of "betting with persons resorting thereto;" (b) keeping a house for the purpose of money being received as consideration of an undertaking to pay money on an event or contingency relating to a horse-race. By sec. 7 two kinds of advertisements are rendered unlawful: (1) advertisements of houses kept for the purpose of "betting with persons resorting thereto;" and (2) advertisements of houses kept for the purpose of exhibiting betting lists. By sec. 3 of the Amending Act of 1874 (37 Vict. c. 13), three offences are created in respect of betting advertisements, namely: (a) advertisements of persons who will on application give information or advice with respect to any bets or wagers as are mentioned in the principal Act, or will make, on behalf of any other person, any such bets or wagers as are mentioned in that Act (sec. 1); (b) advertisements of houses where information or advice with respect to such bets or wagers may be obtained (sec. 2); (c) advertisements inviting persons to make such bets or wagers (sec. 3). The wider application implied in the amending Act created the impression that people were prohibited from advertising themselves as ready to give information or "tips" with respect to ordinary betting transactions. The case of *Cox v. Andrews*,¹ heard in 1883, made it clear that the later statute only prohibited advertisements of betting carried on in any office or place used for the purpose of illegal betting within the meaning of the principal Act. In recent years an entirely different question has arisen for the consideration of the courts. Prior to the amending Act of 1874, many of the betting fraternity had migrated to

¹ 12 Q. B. D. 130.

Scotland, which was expressly excluded by sec. 20 of the principal Act, and advertisements of betting houses, so long as those houses were in Scotland, and therefore legal, were no contravention of sec. 7. Anderson's Act, as the amending statute was called, put an end to this by extending the principal Act to Scotland. In the same way, members of the betting fraternity have transferred their activities to Holland or some other part of the Continent, in the belief that the fact of their offices being situated out of our jurisdiction is sufficient to prevent the business which is advertised in London papers from constituting an offence against the Betting Act of 1853. Most of the cases which have come into court relate to the coupon competitions advertised in sporting newspapers, in which the readers are invited to fill up a coupon with the results of certain impending horse-races or other contests, and to forward the same either to the offices of the newspaper or to some address in Holland. Where the coupon competition is conducted wholly in England, the receipt of filled-up coupons, accompanied by remittances of money, brings the newspaper offices within the second part of sec. 1 of the Act of 1853, as "an office kept for the purpose of money being received as consideration for undertaking to pay thereafter money on events relating to horse-races."¹ On the other hand, it has been held that such a competition is no lottery.² Whether it is a betting transaction or not is a question of fact proper for the finding of the magistrate.³ A newspaper office may be an essential part of the machinery for receiving money for the purpose of illegal betting,⁴ even where money has not been received

¹ *Reg. v. Stoddart*, 1901, 1 Q. B. 177.

² *Caminada v. Hulton*, 60 L. J. M. C. 116.

³ *Stoddart v. Sagar*, 1895, 2 Q. B. 475.

⁴ *Harwe v. MacKenzie*, 1902, 2 K. B. 216.

there.¹ In order to constitute an offence against sec. 1, it is not necessary that the money sent in with the coupons should be intended to be received at the house itself, nor need the intended place of receipt be within the United Kingdom.² "Resorting" to a betting-house within sec. 1 means physically resorting thereto,³ and sending letters and telegrams relating to bets to a house does not amount to physically resorting to the house within the meaning of sec. 1 of the principal Act.⁴ To bring an advertisement within sec. 7 of the principal Act, it must appear by reasonable inference to refer to the two classes of betting prohibited therein.⁵

To constitute an Offence, Money need not be received at the Newspaper Office, nor need the Place of Receipt be within the United Kingdom.—S.⁶ was the owner of a weekly newspaper published at an office in Red Lion Court, Fleet Street. He carried on in its columns a series of coupon competitions, in which prizes were given to such persons as should correctly guess the result of impending horse-races or football-matches. Their guesses were written on certain forms called "coupons," which so filled up were sent by them to S., together with 1*d.* for each guess made. The coupons were procurable at S.'s office, either with or separably from the newspaper, free of charge. In accordance with the instructions in the advertisement in S.'s paper, both coupons and remittances were addressed to "*Sporting Luck, Middelburg, Holland.*" Remittances were

¹ *Lennox v. Stoddart*, 66 J. P. 469.

² *Reg. v. Stoddart*, 177.

³ *Reg. v. Brown*, 1895, 1 Q. B. 119.

⁴ *Ibid.*

⁵ *Ashley and Smith v. Hawke*, 67 J. P. 361.

⁶ *Stoddart v. Hawke*, 1902, 1 K. B. 353.

to be made payable to S., and later to G. S., who was S.'s son. At the post-office postal orders were cashed, payable either to S. or to G. S., and returned from Holland, amounting to £9683. Among postal orders returned for payment through Dutch bankers, with whom G. S. had an account, were numerous orders identified as having been sent to S. and G. S. for the competition. S. was charged under sec. 1 of the Betting Act, 1853, with keeping an office in Red Lion Court for the purpose of money being received by or on behalf of the keeper of the house as the consideration for undertakings to pay money on events relating to horse-races or games. He was convicted. Held, on appeal, that to constitute an offence under that section it is not necessary that the money should be intended to be received at the house itself, nor need the intended place of receipt be within the United Kingdom.

Newspaper Office may be Part of Machinery for receiving Money for Betting.—M.¹ was the occupier of an office in London and the proprietor of a newspaper called *Football Chat*, published at that office. T. conducted at Middelburg, in Holland, a football coupon competition, that is to say, a scheme in which there was a promise by T. to pay a sum of money to such persons as should correctly guess the results of such certain football-matches, and should write their guess on certain forms called coupons. The competition was advertised week by week in M.'s newspapers, and the coupons were arranged as part of the advertisements, and could be procured at M.'s office; they were, when filled up, to be cut out of the paper and sent, with the entrance money, to *Football Chat*, Middelburg, Holland. The names of the winners and the results of the

¹ *Hawke v. Mackenzie*, 1902, 2 K. B. 216.

competition were also advertised in M.'s newspaper. M. received for the insertion of these advertisements a sum considerably more than the charge for ordinary advertisements; but he had no other interest in the competition, nor had T. any interest in the newspaper. M. was charged, under the Betting Act of 1853, for (1) permitting his office to be used by T. for the purpose of money being received by T. as the consideration of or undertaking to pay money on events or contingencies relating to the game of football; (2) for keeping such offices for the said purpose, etc. Held, that there was evidence on which the magistrate could properly find that the office was used as an essential part of the machinery for receiving money for an illegal purpose, and that the conviction was right.

Newspaper Offices where Racing Coupons are received are within the Act.—S.¹ was the occupier of an office, and the proprietor of a newspaper published weekly at that office. Each number of the paper contained a notice of what was called a "coupon competition"—that is to say, of a promise by S. to pay a certain specified sum of money to such persons as should correctly guess the result of a certain horse-race then shortly about to be run, and should write their guesses upon certain forms called "coupons," which were issued with each number of the newspaper, and should return the coupons so filled up to S.'s office, together with the sum of one penny in respect of each guess made. A large number of persons every week sent in to S.'s office coupons filled up as aforesaid, accompanied by remittances of money. S. was upon these facts convicted under the Gaming Act of 1853, of having unlawfully kept the office for the purpose of money being received

¹ *Reg. v. Stoddart*, 1901, 1 Q. B. 177.

by her as the consideration for undertakings to pay thereafter money on events relating to horse-races. Held, that the conviction was right.

Newspaper Offices, even where Money has not been received, may be within Sec. 1.—L.¹ and D. brought actions against S. under sec. 5 of the Betting-House Act (16 & 17 Vict. c. 19), to recover certain moneys paid by L. and D. to S. in respect of coupon competitions in *Sporting Luck*, as money received by S. for the use of L. and D. In the one case the money was paid at the office in Red Lion Court, and the other at Middelburg, in Holland. Judgments were given for plaintiff, and defendant appealed. Held, that S. had committed an offence under sec. 1 of the Betting Act, 1853. To bring a case within that section it is sufficient that a house or office has been used by the occupier as an essential part of the machinery for carrying out the operation of receiving money as or for the consideration for or undertaking to pay thereafter money on an event or contingency relating to any horse-race, although the receipt of the money has not taken place at such house or office. *Stoddart v. Hawke* approved. Sec. 5 of the Gaming Act, 1853, is not repealed by sec. 1 of the Betting (Infants) Act, 1892.

Contract to publish Newspaper containing notice of Coupon Competition is not Illegal.—S.² was the occupier of an office in Holland and the proprietor of a newspaper published weekly in London. Each number of the newspaper contained a notice of what was called a “coupon competition”—that is to say, of a promise by S. to pay a certain specified sum of money to such persons as should

¹ *Lennox v. Stoddart*, 66 J. P. 469; *Lennox v. Davis*, 66. J. P. 469.

² *Stoddart v. Argus Printing Co.*, 1901, 2 K. B. 47.

correctly guess the result of a certain horse-race then shortly to be run, and should write their guesses upon certain forms called "coupons," which were issued with each number of the newspaper, and should send the coupons so filled up to S.'s office in Holland, together with the sum of one penny in respect of each guess made. A., who had made a contract with S. to publish the newspaper on S.'s behalf, refused to perform their contract, upon the ground that the publication of the newspaper was illegal, as being an infringement of sec. 7 of the Gaming Act, 1853, and of sec. 3 of the Betting Act, 1874. Held, that whether the fact of S.'s office being situate out of the jurisdiction was sufficient to prevent the business so carried on by S. from constituting an offence against the Betting Acts or not, there was nothing in the above-mentioned sections to render illegal the publication by A. of the newspaper advertising the said business.

Racing Coupon Competition no Lottery; whether it is a Betting Transaction or not is purely a Question of Fact.—S.¹ published a newspaper containing an advertisement of a "coupon competition," which was to be carried out by means of coupons to be filled up by the purchasers of the paper with the names of the horses selected by the purchasers as likely to come in first, second, third, and fourth in a race. For every coupon filled up after the first, the purchaser paid a penny, and S. promised a prize of £100 for naming the first four horses correctly. S. was prosecuted under the Act for the Suppression of Lotteries, for opening and keeping an office to receive a lottery, for selling tickets and chances in a lottery; also under the Gaming Act, 1853, for opening, keeping, and using an

¹ *Stoddart v. Sugar*, 1895, 2 Q. B. 475.

office for the purpose of money being received as the consideration for or undertaking to pay money on events and contingencies relating to horse-races, and for receiving moneys as deposits on bets, on condition of paying £100 on the happening of events and contingencies relating to horse-races; also under the Betting Act, 1874, for publishing an advertisement inviting all who read it to make bets and wagers on such events and contingencies. In the first case, under the Lottery Acts, the magistrate found as a fact that the winning of the prizes in the competition would be determined by chance and not by skill, and was of opinion that the facts stated were sufficient in law to support the offences charged in the three informations under the Lottery Acts, and convicted S. In the second case (under the Betting Acts), the magistrate was of opinion that the facts stated were not sufficient in law to support any of the offences charged under the Betting Acts, 1853 and 1874, and dismissed the five informations. On cases stated by the magistrate, held, that the transaction did not amount to either a lottery or betting within the meaning of the Acts under which the proceedings were instituted, and the defendants were not liable to be convicted. *Per* Pollock, B.: "The alderman has stated his opinion that the facts stated in the case were not sufficient in law to support any of the offences charged. That finding is well within his province, and if it was desired that any further question should be decided by him, he should have been asked for a further finding. The defendant has been acquitted, and we will not send back the case to be reconsidered. . . . I am clearly of opinion that the facts stated do not show anything amounting to a lottery. . . ." *Per* Wright, J.: ". . . No doubt it is possible that under certain circumstances such a competition as this may be a

betting transaction, for a case can be suggested where the facts might be so found as to show that it was. For instance, if it were found that a place was used for the purpose of money being received as the consideration for a promise to pay money on an event or contingency of or relating to a race, that might amount to a finding that the contract was a wagering contract, and the Betting Act might be held applicable; but there is no such finding in the present case."

To bring Advertisement within Sec. 7 of Betting Act of 1853, it must appear by Reasonable Inference to refer to the Two Classes of Betting prohibited therein.—A. and S.,¹ publishers of a sporting daily, inserted the following advertisement for T. and S., of "Flushing, Holland:—" "The Derby, Ascot Stakes, Royal Hunt Cup, Northumberland Plate, etc. The Continental Sportsman, also Year Book and Ready Reckoner. Free on receipt of address. Telegraphic instructions can be sent to London. All letters to be addressed: 'T. and S., Flushing, Holland.' Postage 2½*d.*; Postcards 1*d.*" B. bought the paper, read this advertisement, and applied to T. and S. for certain documents, which were posted to him in an envelope bearing an English 1*d.* stamp and a London postmark. On the back of the envelope were stamped the words, "If not delivered, to be returned to 150, Fleet Street, London." B. then sent £3 to T. and S., and subsequently addressed a telegram to "Grumble, London," betting 10*s.* each way on a certain horse. This was the telegraphic address of T., a member of the firm of T. and S., at 150, Fleet Street. Further bets were made in the same way, and B. received from T. and S. an account, showing a balance due from T.

¹ *Ashley and Smith v. Hawke*, 67 J. P. 361.

and S. on the betting transactions. A. and S. were then charged with unlawfully causing certain advertisements to be published in the City of London, whereby it was made to appear that an office and place was opened, kept, and used by T. and S. for the purpose of making bets or wagers in manner prohibited by the Betting Act, 1853. A. and S. were convicted. Held, on appeal, that for an advertisement to come within the terms of sec. 7 of the Betting Act, 1853, it must appear by reasonable inference from the advertisement itself that it referred to one of the two classes of betting transactions prohibited or rendered illegal by sec. 1 of the said Act. This was not so apparent on the face of the advertisement in question, as it did not appear that there was or would be "physical resorting" to any office or place in England or Ireland, or that betting was or would be carried on at any such office or place by means of prepayment. The evidence given as to bets and proceedings relating to bets taken pursuant and subsequent to the publication of the advertisement was irrelevant. The conviction, therefore, could not stand.

Sending Letters and Telegrams relating to Bets does not amount to physically resorting to the House within Meaning of Sec. 1 of the Act of 1853.—B.¹ occupied a house which he used for the purpose of betting with any persons who wrote or telegraphed to him, asking him to bet with them. He used it also for the purpose of money being received on his behalf as and for the consideration to pay money on the account of a horse-race. There was no evidence that any person had actually gone to the house for the purpose of betting with the defendant other than those who had gone for ready-money betting. At the trial he

¹ *Reg. v. Brown*, 1895, 1 Q. B. 119.

was indicted, on the first count, under sec. 1 of the Betting-House Act, 1853, for keeping a house for the purpose of betting with persons resorting thereto; and on a second count, for keeping it to receive payments for the purpose of ready-money betting. The Recorder directed the jury, in relation to the first count, that it was not necessary, "for a conviction under the first count, that B.'s house should have been used for the purpose of betting with persons who physically came to the house. But that if the house was used by B. as an office to which any persons who wished to bet with him were to send their communications, and if persons were in the habit of sending letters and telegrams to him there, directing him to make bets with them, such persons resorted to the house within the meaning of the Act, and the jury might find the defendant guilty of using the house for the purpose of betting with persons resorting thereto." Held, on appeal, that upon the trial of an indictment under sec. 1 of the Betting-House Act, 1853, for keeping a house for the purpose of betting with persons resorting thereto, it is unnecessary to show that such persons have physically resorted to the premises, the purpose for which the house is kept being that which is condemned by the section, and the offence may be proved by showing that the house was opened and advertised as a betting-house, although no person ever physically resorted thereto. But where no other evidence than that of resorting is offered in support of such an indictment, there must be evidence of physically resorting, and it is not sufficient to show that letters and telegrams were sent to the accused, directing him to make bets with the senders; persons sending such letters and telegrams do not resort to the house within the meaning of the section.

CHAPTER VI

LIBEL AND SLANDER OF TITLE IN ADVERTISEMENTS

WORDS spoken or written of a person in the way of his business or profession are defamatory, and therefore are actionable without proof of special damages. Slander of title, which enables a man to claim damages for words denying his title to certain property, or disparaging goods which he makes or sells, is, as several authorities point out,¹ really an action on the case for publishing without lawful excuse an untrue statement disparaging a man's goods, and thereby causing him damage. Three elements are essential to a successful action for slander of title: (1) the statement must be false; (2) the statement must be malicious; (3) special damages must be proved to have arisen from the words. Where the words complained of appear in an advertisement, the publisher of the paper where the advertisement appeared is equally responsible with the advertiser.² "The law has always been jealous of the reputation of tradesmen,"³ and slander of title in an advertisement may give rise to greater damages on account of the circulation of the slander.³ The words may be either written or spoken, and their appearance in an advertisement may be evidence of malice. Where the

¹ Odgers, Fraser, and Roscoe.

² *Ravenhill v. Upcott*, 33 J. P. 299.

³ *Per curiam, Harman v. Delany*, 2 Stra. 898.

publication of the defamatory words is necessary to a man's self-defence, it may be excused; but if that object could be effected without advertising the words, he loses all privilege.¹ In an action for slander of title, no presumption exists that the words are untrue, and the plaintiff cannot establish his case without proof of this untruth. He must also give *prima facie* evidence of the defendant's malice, or that he acted without lawful occasion or excuse. In two instances statutory protection is afforded to libellous advertisements. By sec. 4 of the Libel Amendment Act of 1888 (51 & 52 Vict. c. 64), notices or reports issued "for the information of the public" at the request of any Government office or department or of the Commissioner of Police, shall be protected unless published maliciously. Sec. 32 of the Patents Designs and Trade Marks Act of 1883 enacts that where A claiming to be the patentee of an invention, threatens B by advertisements or otherwise with legal proceedings or liability respecting the alleged infringement of such invention, B may bring an action or apply for an injunction against A to restrain the continuance of the threats if the alleged infringement was not in fact an infringement of A's legal rights, but this does not apply if A commences with due diligence an action for the infringement of his patent. An advertisement offering reward for documentary evidence in an action pending is no contempt of court.² Moreover, a man may, by advertising, bring his own conduct or property or goods, within such criticism as amounts to *bona fide* comment on a matter of public interest. This rule is applicable more particularly to

¹ *Lawless v. Anglo-Egyptian Co.*, 4 Q. B. 262; *Brown v. Croome*, 2 Starck, 297; *Lay v. Lawson*, 4 A. & E. 795.

² *Plating Co. v. Farquharson*, 17 Ch. D. 49.

advertisers who sell patent medicines.¹ It applies to a tradesman who distributes handbills or circulars.² But community of interest may secure privileges for libel.³ Whether the words go beyond fair criticism is a question for the jury.⁴ But where the words used in the advertisement are incapable of a defamatory meaning, they cannot be left to the jury;⁵ where the words are capable of such meaning, they cannot be withdrawn from the jury.⁶ An agreement to indemnify the printer against the consequences of a libel is illegal, and therefore will not be enforced.⁷

The elements constituting slander of title have been discussed by the courts in a large number of cases, especially in the well-known case of *White v. Mellin*,⁸ where it was definitely laid down that slander of title must be in the nature of absolute and not merely relative disparagement. The case of *Evans v. Harlow*⁹ is authority for the proposition that the publication of a caution against the value of particular goods amounted to no slander of title nor to a personal imputation. In another case,¹⁰ A's claim that his goods were better than B's was held to be quite consistent with B's article being a very good one, and therefore A's claim was no slander of title. Even where a tradesman's statement that his goods are superior to

¹ *Hunter v. Sharpe*, 4 F. & F. 983.

² *Paris v. Levy*, 2 F. & F. 71.

³ *White v. Batey*, 8 T. L. R. 698.

⁴ *Jenner v. A'Beckett*, 7 Q. B. 11.

⁵ *Mulligan v. Cole*, 10 Q. B. 549.

⁶ *British Empire Type-setting Co. v. the Linotype Co.*, 14 T. L. R. 253, 511.

⁷ *Shackell v. Rosier*, 2 Bing. N. C. 635.

⁸ 1895, A. C. 155.

⁹ 5 Q. B. 624.

¹⁰ *Young v. Macrae*, 3 B. & S. 264.

another's is untrue, it is not a trade libel.¹ In all these cases the words complained of, even where they amounted to disparagement, were not disparaging in an absolute sense. Slander of title, however, exists where the disparagement is not of a relative character. In *The Western Counties Manure Co. v. the Lawes Chemical Manure Co.*,² a trader, in comparing, by advertisement, a rival's goods with his own, went to the length of declaring that the article sold by the plaintiff was of "a low quality;" and this was held to amount to slander of title, on which an action could be maintained. The distinction between absolute and relative disparagement was set out fully in the judgment of the House of Lords in *White v. Mellin*.³ In that case the plaintiff supplied the defendant with bottles enclosed in wrappers bearing the words "Mellin's Infant's Food." The defendant sold the bottles again to the public after affixing a label to the plaintiff's wrappers. The label recommended the public to buy defendant's infant food, and described it as "far more nutritious and healthful than any other preparation yet offered."

Where the plaintiff who has obtained a verdict fears a continuance of the libel, he may apply to the judge there and then for an injunction to restrain any further publication of the libel or slander. It is submitted by a great authority on the law of libel⁴ that where the words are not actionable in themselves, the plaintiff cannot be entitled to any injunction until he has established a complete cause of action. In cases of defamation the court has power to grant an interlocutory injunction,⁵ and this jurisdiction

¹ *Hubbuck and Sons v. Wilkinson, Heywood, and Clarke*, 1 Q. B. 86.

² 9 Eq. 218.

³ 1895, A. C. 155.

⁴ Odger's "Law of Libel and Slander."

⁵ *Bonnard v. Perryman*, 1891, 2 Ch. 269.

is not confined to words affecting trade or business.¹ Even in cases of defamation which do not require proof of special damage, the jurisdiction to grant an interlocutory injunction has been held to be "of a very delicate nature, and it ought only to be exercised in the clearest cases." The rules laid down, according to Mr. Odgers,² for granting interim injunctions, as set up by the cases decided up to now, are: (1) where the words are so clearly libellous that if a jury found them not to be libellous the court would set aside the verdict as unreasonable; (2) where the words are such that a jury could not properly find them to be a fair comment on a matter of public interest; (3) if the words are not such that a jury might properly find them to be a fair and accurate report of a judicial proceeding; (4) where the occasion of publication is privileged, the court will not try the issue of malice or no malice on affidavit, except, perhaps, in the plainest cases; (5) where, there being a plea of justification, the court is satisfied there is no reasonable prospect that defendant will prove his words are true; (6) where there is evidence that defendant intends to continue the circulation of the libel; (7) where it is established that irreparable or very serious injury will result from continuance of libel; (8) where plaintiff has not disintitiled himself to relief by delaying his proceedings or by other conduct.

Slander of Title in Advertisement.—R.³ purchased an estate in Staffordshire after the title thereto had been contested by a long series of litigation. After selling certain portions of the estate in building lots, he started to

¹ *Monson v. Tussaud*, 1894, 1 Q. B. 671.

² *Libel and Slander*, 4th Edition, 398.

³ *Ravenhill v. Upcott*, 33 J. P. 299.

advertise the sale of further portions. An advertisement was sent to the *Wolverhampton Chronicle* in the ordinary course of business, and published once. It was as follows: "Important Notice. Horsehill Estate. The public are respectfully requested not to buy any property formerly belonging to A, B, and C, without ascertaining that the title-deeds of the same are correct; as the heirs are not dead nor abroad, but still alive." This appeared just at the time when R. was advertising the sale of the estate in building lots; but the advertisement revived all previous doubts about R.'s title, and rendered the estate practically unsaleable. At the end of a week R. wrote to U., who had published the advertisement, and complained of it, and asked for the name and address of the person who sent it to the paper. This U. at once furnished; but on January 30 he was served with a writ. On February 10 he inserted an apology, and at the trial of the action brought by R. against U. for slander of title it was pleaded for defendant that he had apologized at the earliest opportunity within the meaning of 6 & 7 Vict. c. 9, s. 2. The judge ruled against defendant on the point. The jury, under the direction of the judge, found for plaintiff.

Advertisement as Evidence of Malice.—H.¹ was gunsmith to the then Prince of Wales, and a paper called the *Craftsman* announced that H. had had the honour of presenting His Royal Highness with a gun 2 feet 6 inches long, which would shoot as far as one a foot longer. D. then published the following advertisement: "Whereas there was an account in the *Craftsman* of John Harmer, gunsmith, making guns of two feet six inches to exceed any made by others of a foot longer (with whom it is

¹ *Harman v. Delany*, 2 Stra. 898.

supposed he is in fee), this is to advise all gentlemen to be cautious; the said gunsmith *not daring to engage with any artist in town*, nor ever did make such an experiment (except out of a leather gun), as any gentleman may be satisfied of at the Cross Guns in Long Acre." Held, a libel on the plaintiff in the way of his business. Verdict for plaintiff. Damages £50. *Per curiam*: "... They might advertise that they make as good as he, but they ought not to say he is no artist, which they plainly do by saying he dares not engage with any artist, and by advising gentlemen to be cautious of him; the law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person; and if bare words are so, it will be stronger in the case of a libel in a public newspaper, which is so diffusive."

Advertisement offering Reward for Documentary Evidence in an Action pending is no Contempt of Court.—F.¹ carried on the business of nickel-plating. P., a company which owned a patent process for nickel-plating, obtained an injunction to restrain F. from infringing the patent, and F. gave notice of appeal. F. then published an advertisement in a daily paper, inviting the trade to subscribe towards the expenses of the appeal. Another advertisement was published, offering a reward of £100 to any one who could produce documentary evidence that nickel-plating was done before 1869. P. therefore sought to commit the publishers for contempt of court in publishing these advertisements as being an interference with the course of justice. Held, that as all persons engaged in

¹ *Plating Co. v. Farquharson*, 17 Ch. D. 49.

the trade of plating had a common interest in resisting P.'s claims, an advertisement asking them to contribute to the expenses of defending the proceedings was open to no objection. Held also, that the advertisement offering a reward for documentary evidence was free from objection.

Evidence of General Loss of Business admissible where Libel is in the Way of a Man's Trade.—R.¹ carried on the business of an engineer and boiler-maker, under the name of "Ratcliffe and Sons." He became entitled on his father's death to the good will of the business, which had been carried on by his father and others as "Ratcliffe and Sons." E., the owner of a local paper, published a paragraph to the effect that R. had ceased to carry on his business of engineer and boiler-maker, and that the firm of Ratcliffe and Sons did not then exist. The statement of claim alleged that E. had falsely and maliciously published and printed of R. in relation to his business certain words, etc. At the trial the statement of claim was allowed to be amended by the addition of the words, "by reason of the premises, the plaintiff was injured in his credit and reputation, and in his said business of an engineer and boiler-maker, and he thereby lost profits which he otherwise would have made in his said business." R. proved the publication of the statements complained of, and that they were untrue. He also proved a general loss of business since the publication; but he gave no specific evidence of the loss of any particular customers or orders by reason of such publication. In answer to questions left to them, the jury found that the words did not reflect upon R.'s character, and were not libellous; that the

¹ *Ratcliffe v. Evans*, 1892, 2 Q. B. 524.

statement that the firm of Ratcliffe and Sons was extinct was not published *bonâ fide*; and that R.'s business suffered injury to the extent of £120 from the publication of that statement. Judgment was then given for R. for £120 and costs. On appeal it was contended for E. that proof of special damage was necessary to support the action, and that the evidence given by R. of a general loss of business ought not to have been admitted. Held, that in an action for words not actionable *per se*, but constituting an untrue statement maliciously published about a man's business, which statement is intended or reasonably likely to produce, and in the ordinary course of things does produce, a general loss of business as distinct from the loss of particular known customers, evidence of such general loss of business is admissible, and sufficient to support the action. *Per* Bowen, L.J.: "... The case of *Hargrave v. Le Breton*,¹ decided a century and a half ago . . . shows what sound judgment itself dictates, that in an action for falsehood producing damage to a man's trade which in its very nature is intended or reasonably likely to produce a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible."

Community of Interest may secure Privilege for Libel.—To² put a stop to the practice of filling bottles, marked with the name of one manufacturer, with water made by another, manufacturers of aerated and mineral waters formed themselves into a Mineral Water Bottle Exchange and Trade Protection Society. W. and B. were among the manufacturers who joined the society. The rules of

¹ 4 Burr. 2422.

² *White and others v. Batey & Co.*, 8 T. L. R. 698.

the society provided that the council of the society had power to refer to arbitration any claims or demands against the society or its members; that every member should be required to forward the objects of the society, and to report to the secretary of the society all such information respecting the proceedings of any member in possession of or otherwise dealing improperly with the bottles or boxes of any member, or doing any act or acts calculated to injure the trade. B. wrote to the secretary of the society, complaining that W. systematically and habitually filled other people's bottles, especially B.'s, with liquids of their own manufacture. Collins, J., held the letter privileged, and said that B. had a right to put forward this complaint in the way he did, as the society was the tribunal which both W. and B. had chosen to create for the purpose.

Words capable of Defamatory Meaning cannot be withdrawn from Jury.—A and B¹ were owners of patent rights for the manufacture of certain type-setting machines, and had them in use in various parts of the world. Five machines of A's make were sent to a newspaper office for trial, and a dispute arose with a printers' trade union about their use. In consequence of this dispute it was found necessary to discontinue four out of five of the machines. Paragraphs setting out these facts, and that the machines had given every satisfaction, appeared in a trade paper. Subsequently B, getting to know of this, sent a paragraph, with a request for its insertion, to two newspapers. The paragraph ran thus: "The Empire Type-setter in America:—*The Union Printer and*

¹ *The British Empire Type-setting Machine Co. v. the Linotype Co.*, 14 T. L. R. 253, 511.

American Craftsman, the most wideawake and spirited of American trade journals, has recently contained several references to the Empire composing-machines, which were installed in the office of the New York *Evening Sun* with such a flourish of trumpets. From these paragraphs we gather that five machines altogether had been employed in this office, the first being introduced some time in the month of February last, and the other four commencing operations on March 9 last. So short-lived, however, does this installation appear to have been, that we learn the machines were discontinued on Wednesday, April 29, and now the Empire Company is in receipt of notice to remove them altogether in the course of a few days. This will be a very serious blow for this machine." The plaintiffs were unable to say what damage they had suffered by the paragraph complained of. It was submitted for B that the paragraph was not a libel at all, because it was not defamatory; if, however, it was a trade libel, no evidence had been given of special damage, of which proof was necessary. The jury found that the words complained of were a libel, and that they were directed against the business of the company as vendors of these machines generally, and were not merely a disparagement of the particular machines, and that B published the words maliciously, intending to attack A in the conduct of A's business; and assessed the damages at £500. Held, on appeal, by A. L. Smith and Chitty, L.JJ. (Vaughan Williams, L.J., dissenting), that the words were capable of the defamatory meaning found by the jury. *Per* A. L. Smith, L.J.: "In my opinion, it is the law that if a publication be such that a person of ordinary intelligence reading it might naturally come to the conclusion that the publication imputed to a trader either misconduct, or

want of care, or of qualification, or of skill in his business, and the statement is proved to be untrue, the occasion not being privileged, then the case must be left to the jury, and it is not competent for the judge to withdraw it from them, for they are the tribunal, if there be ground for assuming that the imputation may be libellous upon the plaintiff to say whether the document published does in fact make any such imputation upon him. . . . To falsely write of a trader that he sells or sets up worthless or unworkable wares is a libel upon the trader in the way of his trade, for it imputes either carelessness or incapacity therein, and this, in my opinion, is what the defendants have written and published of and concerning the plaintiffs.”

Whether Words go beyond Fair Criticism is a Question for the Jury.—J.¹ and others were manufacturers of bags, and had manufactured a bag which they called “The Bag of Bags.” A. printed and published, concerning J. and others in the way of their business, the following words: “As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar; and which has been forced upon the notice of the public *ad nauseum*.” Lush, J., held, that the words could not be deemed libellous, either upon J. or upon their mode of conducting business. But Mellor and Harman, L.J., thought that it was a question for the jury whether the words went beyond the limits of fair criticism, and whether or not they were intended to disparage J. in the conduct of their business.

¹ *Jenner v. A'Beckett*, 7 Q. B. 11.

Words incapable of Defamatory Meaning cannot be left to Jury.—M.,¹ a certified art master, became master of the Walsall School of Art, which was subsequently called the Walsall Science and Art Institute. C. and others were chairman, treasurer, and secretary of the institute. In consequence of disagreement, M.'s engagement with C. and others ceased by notice from them. M. afterwards established a new school of art called the Walsall Government School of Art, and he had obtained subscribers and received subscriptions for it. A few weeks after the new school was opened, C. and others published an advertisement in the *Walsall Observer* as follows: "Walsall Science and Art Institute. The public are informed that Mr. M.'s connection with the institute has ceased, and that he is not authorized to receive subscriptions on its behalf." The advertisement was signed by defendants, as officers of the institute. The innuendo alleged was that M. falsely pretended to be authorized to receive subscriptions on behalf of the institute; but at the trial the learned judge directed a nonsuit, on the ground that the advertisement was not capable of the defamatory meaning attributed by the innuendo. Held, that the nonsuit was right; for that the advertisement was not capable of a defamatory meaning.

Patent Medicines extensively advertised open to Public Criticism.—M.² belonged to a class of pill-vendors who styled themselves "hygeists," and issued advertisements in which the pills he manufactured were described as a cure for diseases of every kind. W., one of the "hygeists," persuaded a sick man named R. to take the pills, with the result that R. died, and W. was sentenced for manslaughter,

¹ *Mulligan v. Cole and another*, 10 Q. B. 549.

² *Morrison and another v. Harner and another*, 3 Bing. N. C. 759.

and another, S., was sentenced for the manslaughter of M. under similar circumstances. H. made repeated efforts to bring M.'s pills into disrepute, and published the words: "We may safely claim the merit of having crushed the self-styled hygeist system of wholesale poisoning, since we commenced exposing the homicidal tricks of these impudent and ignorant scamps." The jury found for the defendants on these issues.

H.¹ was a medical practitioner with an American degree, who came over to London and entered into partnership with two properly qualified medical assistants. In conjunction with them he established himself in practice, especially in cases of consumption, and he organized an extensive system of advertisement, in which a work of his upon consumption was republished in the newspapers in serial form, with prefaces put forth in the name of his assistants—as if they were independent practitioners—and in which his own name appeared as M.B. generally, although in the title-page of the book he was called M.B. of New York. S., the proprietor of the *Pall Mall Gazette*, published an article, in which H. was denounced as a quack, impostor, and like scoundrels who passed bad coin. H. sued S. for libel. The jury found a verdict for H., with one farthing damages. Held, a public writer, in commenting upon matters of public interest, is protected and excused if, in writing honestly and with reasonable moderation and self-control, he makes, through mistaken references on the matters of fact involved, defamatory statements the truth of which he cannot substantiate. Publications having been issued by a medical practitioner by way of advertisement, the effect of which was to represent that he was in possession of a

¹ *Hunter v. Sharpe*, 4 F. & F. 983.

specific remedy for a disease hitherto regarded as incurable, held to be a matter of public interest, and fair and proper subject for public comment. A public writer having in commenting thereon represented the author as a quack, impostor, and also—by reason of his describing himself as an M.B. on account of a diploma obtained abroad—as like scoundrels who pass bad coins; and there being evidence that his publications teemed with statements extravagant and exaggerated and alarming, held that if they were consciously so, and if H. did not really believe them, these epithets were justifiable. But further held, that even if they were not so in fact, if the jury were satisfied that the writer really believed that they were so, and that he was writing honestly and with reasonable regard for moderation, he was excused and protected.

Public Criticism of Advertisement may be well-founded.
—P.¹ was a marine store dealer carrying on business at Clapham. He issued a handbill, offering prices for kitchen stuff, left-off apparel, etc. Thereupon L., the proprietor of the *Daily Telegraph*, drew attention to the handbill in a paragraph which was headed: “Encouraging Servants to rob their Masters.” P. sued L. for libel. Earl, C.J., told the jury: “If P. puts forward a handbill and draws public attention to it, which in the opinion of the editor is most dangerous to honesty, and holds out a temptation to servants to depart from their duty, it may be the editor will be able strictly to excuse before a jury the remarks he has made if in their judgment they are well-founded and wholly applicable to it. If you consider the handbill issued by P. has the dangerous tendency attributed to it by

¹ *Paris v. Levy*, 2 F. & F. 71.

L., then the editor has done that which may be salutary for the community in preventing such encouragements being given, and that he has not been actuated by malice against P., but from a desire founded on the principle of fair dealing and honesty to prevent such temptations being held out to dishonesty."

Trader's Statement that his Goods are superior to those of Another, even if Untrue, is not a Trade Libel.—H.¹ was a manufacturer of zinc paint, which he called "Hubbuck's Patent White Zinc." W. and the other defendants were the manufacturers of a similar article called "Bell Brand Genuine White Zinc." A firm of builders and decorators made a number of experiments on the two paints for the purpose of comparing them. The report they made gave particulars of the mode of comparison of the two paints, and concluded as follows: "Exactly nine pounds of paint were used in each case, and each coat took the same quantity of paint. Judging the finished work, it is quite evident that W. H. & Co.'s zinc has a slight advantage over Hubbuck's, but for all practical purposes they can be regarded as being in every respect equal." W. and the other defendants published a circular containing this report in China and Japan. H. brought an action for libel against W. The statement of claim alleged that the report and each statement in it were untrue; that H.'s paint was not equal or inferior, but superior to W.'s; and that H. had, by reason of the premises, been injured in his business and credit. W. applied to strike out the statement of claim as showing no reasonable cause of action. The master made an order for striking out the statement of claim unless within a limited time H. amended it by

¹ *Hubbuck and Sons v. Wilkinson, Heywood, and Clarke*, 1899, 1 Q. B. 86.

alleging special damage with full particulars. It was held, on appeal, that judgment must be entered for defendants. Held, that a statement by a trader that his own goods are superior to those of another trader, even if untrue and the cause of loss to the other trader, gives no cause of action; that the allegation that the statement was made maliciously could not convert a statement *prima facie* lawful into one *prima facie* unlawful; and that the allegation and proof of special damage would not improve H.'s case.

Publication of Caution against Particular Goods no Slander of Title nor a Personal Imputation.—E.¹ carried on the trade of an engineer, and sold goods called “self-acting tallow syphons, or lubricators.” He was the inventor and registered proprietor of an original design for making impressions on articles manufactured in metal, on which the design was used. H., a rival tradesman, issued an advertisement, warning the public against a “person offering what he calls his self-acting tallow syphon, and stating that he is the sole inventor. Such a patent does not exist.” No innuendo was put upon the words, and no special damage was alleged. Held, on demurrer, no libel on plaintiff, either generally or in the way of his trade. *Per* Lord Denman, C.J.: “If we hold this to be a libel, then every tradesman who publishes that his goods are better than those of some other tradesman will be liable to an action.” *Per* Wightman, J.: “The absence of any personal imputation on the plaintiff distinguishes the case from that which is most like the present, namely, that of *Harman v. Delany*.”

A's Claim that his Goods are better than B's consistent

¹ *Evans v. Harlow*, 5 Q. B. 624.

with B's Article being a very Good One.—M.¹ published a circular comparing his paraffin oil with that of Y., and embodying the report of a professor of chemistry, who described M.'s oil as "a colourless and somewhat aromatic liquid," while Y.'s oil was described as having "a reddish-brown tinge, is much thicker, and has a more disagreeable odour" than the other. Y. sued M. for libel in the way of trade. Held, that no action lay, since the comparison alleged not that Y.'s article was bad, but that it was inferior to M.'s, which was consistent with Y.'s article being in itself a very good article. *Per* Cockburn, C.J.: "If this is a libel, the effect would be to put down ninety-nine out of every hundred advertisements of articles that we see."

Where a Trader advertises a Rival's Goods as of "Low Quality," an Action is maintainable.—A and B² were rival manufacturers of artificial manures. B circulated an analysis in detail, purporting to show the proportion of phosphates and ammonia in A and B's artificial manures respectively. The letterpress accompanying the analysis described B's as much the best, and A's as an article of "low quality." A then sued B for trade libel, and alleged special damages. *Per* Bramwell, B.: "... it appears there was a statement published by B of A's manufacture which is comparatively disparaging of that manufacture, which is untrue so far as it disparages it, and which has been productive of special damage to A; and it is stated that that publication was made falsely and 'maliciously,' which possibly may mean nothing more

¹ *Young v. Macrae*, 3 B. & S. 264.

² *The Western Counties Manure Co. v. the Lawes Chemical Manure Co.*, 9 Eq. 218.

than that it was made falsely, and without reasonable cause calling for a statement by B on the subject. But if actual malice is necessary—which I do not think is the case—the allegation is sufficient. It seems to me, however, that where a plaintiff says, ‘You have without lawful cause made a false statement about my goods, to their comparative disparagement, which false statement has caused me to lose customers,’ an action is maintainable.”

M.¹ was the proprietor of a certain food for infants. He sold the food in bottles enclosed in wrappers bearing the words, “Mellin’s Infant’s Food.” Among others he supplied with the bottles was W. W. sold the bottles again to the public, after affixing to M.’s wrappers a label as follows: “Notice.—The public are recommended to try Dr. Vance’s prepared food for infants and invalids, it being far more nutritious and healthful than any other preparation yet offered. Sold in barrels, each containing 1 lb. nett weight, at 7½*d.* each, or in 7-lb. packets 3*s.* 9*d.* each. Local agent, Timothy White, chemist, Portsmouth.” W. was the proprietor of Vance’s food. M., on discovering W.’s practice, brought an action, claiming an injunction to restrain him and damages. Held, that as the label made no reference to M.’s food it could not be said to have disparaged it, and that no action would lie.

In the Case of a Trade Libel, the Court has Jurisdiction to grant an Interlocutory Injunction.—B.² and others were associated together with a financial company in the City. P., the proprietor of a financial paper, attacked them in an article, which described B. and his associates as being guilty of fraudulent and dishonest conduct. B. sued P.

¹ *White v. Mellin*, 1895, A. C. 155.

² *Bonnard v. Perryman*, 1891, 2 Ch. 269.

for libel, and applied for an interim injunction till the trial of the action, to restrain P. from repeating the libel. Held, that the court has jurisdiction to restrain by injunction, and even by an interlocutory injunction, the publication of a trade libel. But the exercise of the jurisdiction is discretionary, and an interlocutory injunction ought not to be granted except in the clearest cases—in cases in which, if a jury did not find the matter complained of to be libellous, the court would set aside the verdict as unreasonable. An interlocutory injunction ought not to be granted when the defendant swears that he will be able to justify the libel, and the court is not satisfied that he may not be able to do so. Decision of North, J., granting an interlocutory injunction to restrain the publication of an alleged libel, reversed, Kay, L.J., dissenting. *Per* Coleridge, Esher, Lindley, Bowen, Lopes, L.JJ.: “Is there jurisdiction in the Supreme Court to issue an injunction to restrain the publication of an alleged libel, either at all or before the libel has been adjudged to be such? Prior to the Common Law Procedure Act, 1854, neither courts of law nor courts of equity could issue injunctions in such a case as this: not courts of equity, because cases of libel could not come before them; not courts of law, because prior to 1854 they could not issue injunctions at all. But secs. 79 and 82 of the Common Law Procedure Act, 1854, undoubtedly conferred on the courts of common law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation. This power was, by the Judicature Act, 1873, conferred upon the Chancery Division of the High Court, representing the old courts of equity. But it is obvious that the subject-matter of an action for defamation is so special as to

require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong."

Injunction will not be granted where there is no Malice.
—D. and M.¹ were rival dealers in a particular kind of tyre. In reply to an inquiry from a customer, M.'s manager wrote that neither D. nor any other company except M. could supply any one with the tyre, as M. alone had the right to import such tyres into England. No special damages resulted from the statement, as the customer, in spite of it, ordered and obtained the tyres in question from D. D., however, applied for an injunction, and Walton, J., granted it. Held, on appeal, that judgment must be for M. and the injunction dissolved, on the ground that there was no malice on his part.

Special Damage must be established before an Injunction.
—In 1897² two trade-marks registered by the R. Company of New York were expunged from the register at the instance of W., C., & Co. Both trade-marks were labels, containing prominently the words, "Royal Baking Powder." Shortly afterwards W., C., & Co. issued a circular, stating that the R. B. P. Co. were using a label for their goods which it was illegal for them to use, as they, W., C., & Co., had obtained an order expunging the label from the register of trade-marks. They also stated that they intended to take proceedings against any person selling goods so labelled. Held, that if the circular had been

¹ *Dunlop Pneumatic Tyre Co. v. Maison Talbot, and others*, 20 T. L. R. 581.

² *Royal Baking-powder Co. v. Wright, Crossley, & Co.*, 18 R. P. C. 95.

issued maliciously, and had produced special damage to the R. B. P. Co., an action would lie.

Where Material Questions will be raised at Trial, an Interlocutory Injunction ought not to be granted.—M.¹ had been tried in Scotland upon a charge of murder by shooting with a gun. The jury returned a verdict of “Not proven.” T., the proprietor of an exhibition of wax figures representing celebrated and notorious personages, exhibited a portrait model of M. with a gun, described as M.’s gun. In the same room were figures of Napoleon I. and three other persons, of whom one was convicted of murder, another committed suicide to avoid arrest, and another was a person charged with having been concerned in the alleged murder with which M. was charged, but who could not be found. In the room were also relics of Napoleon I. and the Duke of Wellington. In another room, called “The Chamber of Horrors,” where figures of notorious murderers were exhibited, were models of the scenes of murder, together with a model of the spot where the murder with which M. was charged was alleged to have taken place. M. sued T. for libel, and applied for an interlocutory injunction to restrain T. from exhibiting the figure of himself pending the trial of the action. It appeared that the defendants did not intend to justify, the defence being simply that the exhibition was not libellous. Held, by the Queen’s Bench Division (Mathew and Collins, JJ.), that the case was so clearly one of libel, that a verdict to the contrary ought to be set aside as unreasonable, and therefore, under the circumstances, an interlocutory injunction ought to be granted. On appeal, it appeared from further

¹ *Monson v. Tussauds, Limited* ; *Monson v. Louis Tussaud*, 1894, 1 Q. B. 671.

affidavits filed, that there would be a question at the trial whether M. had consented to the exhibition complained of. Held, by the Court of Appeal (Lord Halsbury, Lopes, L.J., and Davey, L.J.), that, that being so, according to the rule laid down in *Bonnard v. Perryman*, an interlocutory injunction ought not to be granted. By Lord Halsbury: "The decision in *Bonnard v. Perryman* cannot be considered as laying down an absolute rule limiting the jurisdiction given to the Court by the Judicature Act, 1873, sec. 25, sub-sec. 8, to grant an injunction by interlocutory order where it shall appear to them to be just or convenient; and, but for the question raised by the further affidavits, a clear case of libel having been shown to the court, the injunction ought to have been granted." By Lopes, L.J., and Davey, L.J.: "The judgment of the Court of Appeal in *Bonnard v. Perryman* lays down an absolute rule of practice with regard to the circumstances under which an interlocutory injunction ought to be granted, pending the trial in actions of libel." By Lopes, L.J.: "There not being so clear a case of libel that a verdict to the contrary ought to be set aside as unreasonable, according to the rule in *Bonnard v. Perryman*, the injunction ought not to be granted. By Lord Halsbury and Davey, L.J.: "The jurisdiction to issue injunction in cases of libel is not confined to cases of libels affecting a trade or business."

Where Injunction against a Rival is advertised, Advertisement may be restrained by Injunction.—A,¹ who traded as R. H. & Co., and B, who traded as R. H. and Sons, were rival manufacturers of sail-cloth. A had formerly been a partner in B's firm. In 1885 B brought an action against A, claiming an injunction to restrain him from representing

¹ *Hayward & Co. v. Hayward and Sons*, 34 Ch. D. 198.

his firm to be the original firm of R. H. & Sons. At the trial of the action, the judge was satisfied by the evidence that A had never made any such representation, but that on two or three occasions one of A's agents, without his knowledge or concurrence, had represented that A's firm was the original firm. A repudiated this as soon as he knew of it, and offered at the trial an undertaking that he would never make such a representation. North, J., desired that this undertaking should be inserted in the judgment. A assented, and it was accordingly inserted in the judgment drawn up by the registrar. In 1886 B distributed a printed circular, which stated that they were the original firm, and, after giving the title of the former action, headed by the word "Caution," proceeded: "By the judgment A was ordered to undertake not to represent that his firm is or that A's firm is not the original firm of R. H. and Sons. Messrs. R. H. and Sons, finding that serious misrepresentations were in circulation to their prejudice, felt themselves compelled to bring the above action." Held, that the circular contained an untrue statement of the effect of the judgment in the former action; that it was a libel injurious to A's trade; that it was not privileged; that B had published it maliciously; and that A was entitled to an injunction with the costs of the action. But there being no evidence of damages to A, except his own affidavit that the publication of the circular was calculated to injure him, and had injured him in his business, which he said had greatly fallen off since the issue of it; and A. not having brought the action till three months after he knew of the publication of the circular, only £5 damages were awarded to him.

Advertisement of Injunction obtained against a Rival

restrained by Injunction.—G.¹ owned two patents for manufacturing cotton belting. K. was formerly G.'s agent. In 1883 an injunction was granted to restrain K. from selling the belting of other manufacturers as that of G.'s. Subsequently, G. inserted an advertisement in the *British Trade Journal*, complaining that unprincipled persons were imitating his belting and misleading the public, stating that the above injunction had been granted, and that he had reason to believe that K. still continued to sell a large quantity of other belting than his. North, J., granted an injunction with costs against both G. and the publisher of the *British Trade Journal*, and also ordered G. to pay £500 damages.

Injunction not granted against a Privileged Communication.—B.² was a shareholder in Q., a gold-mining company, and he issued a circular to his brother shareholders, containing statements as to the financial position of Q., which were not positively proved to be untrue. The circular also invited all the shareholders to take some joint action with reference to Q. Q. sued B. for libel, and applied for an interlocutory injunction. Held, that though the Court had jurisdiction to grant an interlocutory injunction restraining the publication, yet it would not do so when the circular was, as here, *prima facie* a privileged communication.

*Advertisement commenting on Pending Litigation restrained by Injunction.*³—While the evidence in a Chancery suit was being taken before the examiner, C., the plaintiff,

¹ *Kerr v. Gandy*, 3 T. L. R. 75.

² *Quartz Hill Gold-mining Co. v. Beall* (C. A.), 20 Ch. D. 501.

³ *Coleman v. West Hartlepool Harbour Co.*, 8 W. R. 734.

caused the following advertisement to be inserted in the *Times*: "To the share and debenture holders of the West Hartlepool Harbour and Railway Company:—I have just published a reply to the proceedings of a meeting of proprietors held at West Hartlepool on the 28th June last, which may be had of . . . King, Parliament Street, and all booksellers. B. Coleman . . . Street, London." The pamphlet was full of abuse of the chairman of the defendant company, and also gave a digest of C.'s evidence before the examiner. Wood, V.C., granted an injunction to restrain C. and his agents from publishing so much of the pamphlet (stating the objectionable passages), and from publishing or offering for sale during the progress of this suit any book or pamphlet containing statements of the proceedings in this suit; and also from making public any of such proceedings otherwise than in the due course of the prosecution of this suit until the hearing of the cause or until the further order of the court.

Sermon on a Pending Action restrained by Injunction.
—B.,¹ one of the defendants in an action, was a Nonconformist minister, and circulated a handbill through the town in the following words:—"Chancery Suit. Congregational Church, Herne Bay. On Sunday morning, June 25th, the Rev. Thomas Blandford will preach a sermon with special reference to the trial in which the town is so deeply interested, and which is fixed for the 27th and following days. Divine service to-morrow at 11 o'clock." About forty inhabitants of Herne Bay were to be examined as witnesses at the trial. Bacon, V.C., on Saturday the 24th, granted an injunction to restrain B. from preaching any sermon or delivering any address with

¹ *Mackett v. Commissioners of Herne Bay*, 24 W. R. 845.

special or other reference to the trial, and from issuing these handbills or being in any way instrumental in the publication or distribution of these or any other like handbills or notices, and from otherwise prejudicing or interfering with the trial of the action or the persons to be examined as witnesses therein.

Jurisdiction to grant Injunctions extends to Oral as well as to Written Statements.—B.¹ was a manager in the employment of L., who dismissed him from his service. B. then went among L.'s customers saying L. was insolvent, and advising some of them not to pay L. for machines which had been supplied through B. L. brought an action to restrain B. from making statements that L. was about to stop payment, or was in difficulties or insolvent, and from in any way slandering L. or injuring his reputation or business. No special damage was proved. Held, by Pearson, J., and the Court of Appeal, that the Court has jurisdiction to restrain a person from making slanderous statements calculated to injure the business of another person, and that this jurisdiction extends to oral as well as written statements, though it requires to be exercised with great caution as regards oral statements, and that in the present case an injunction ought to be granted.

Power to grant Injunction dates from the Judicature Act.—B.² and others were coopers in Cork and Limerick, who made butter-firkins by hand. P. started a manufactory near Limerick for making similar firkins by machinery. B. and others, being annoyed at this, induced the butter-merchants of Limerick to print and widely

¹ *Hermann Loog v. Bean*, 26 Ch. D. 306.

² *Punch v. Boyd and others*, 16 L. R. Ir. 476.

distribute a "Notice to Farmers," stating that they would not purchase any butter packed in machine-made firkins, as they found them "to be most injurious to the keeping qualities of the butter," to the great injury of P.'s business. The Irish Queen's Bench Division granted an injunction to restrain the publication of this notice, on the authority of *Hermann Loog v. Bean*, holding that the Judicature Act had altered the law as laid down in a previous case where it had been held that the Court had no power to issue injunction.

Injunction to restrain Libel granted in King's Bench Division.—S. and E.¹ were rival manufacturers of railway signals. They both invented practically the same improvement; but E. was the first to patent it. S. subsequently petitioned for a patent, but was refused as being too late. Thereupon E. published an advertisement, announcing that "Saxby's application was cancelled by the Crown on the ground of piracy from {Easterbrook." S. claimed £1000 damages, and an injunction to restrain E. from publishing libels against S. of like nature and description. The jury awarded 40s., and Lord Coleridge, C.J., granted a perpetual injunction. The Divisional Court decided that he had power so to do, as the jury had previously found the matter libellous.

Injunction will not be granted unless Statements are Malâ Fide.—A.,² a gun-manufacturing company, obtained contracts to supply guns to the nation. Armit and others published a newspaper article, commenting on recent alleged irregularities in the Ordnance Department of the War Office, whereby defective guns, etc., had been supplied to the nation, and accepted without sufficient trial. The

¹ *Saxby v. Easterbrook*, 3 C. P. D. 339.

² *Armstrong v. Armit*, 2 T. L. R. 887.

article also asserted that A. had obtained contracts from Government officials by corrupt means. A. brought an action for damages, and also applied for an injunction to restrain the editor and printer of the paper from further publishing libellous matter of A. pending the action. The Court (Lord Coleridge, C.J., and Denman, J.) refused the application, as the subject-matter of the article was clearly one of great public interest, and the comments thereon were not proved to be *malá fide*.

Injunction granted where Statements are False, and there is Evidence that they would be continued to be issued.—L.¹ issued circulars declaring that A. was wrongfully using L.'s labels upon his jars of extract of meat, and threatening A.'s customers with legal proceedings for buying and reselling his jars bearing those labels. A. applied for an injunction to restrain L. from issuing such circulars; but the Court refused to grant it, because it was not satisfied that the statements complained of were untrue. Subsequently, A. issued new wrappers for his meat-jars, with a photograph of Baron Liebig, and the words, "This is the only Genuine Brand." L., whose brand was at least as genuine as A.'s, thereupon applied for and obtained an injunction restraining him from using such wrappers, although the company had themselves issued misleading advertisements.

Use of Established Name must be accompanied by Precautions to prevent Purchasers from supposing they are buying the Original Article.—Joseph Thorley² for many years manufactured and sold extensively an article called

¹ *Anderson v. Liebig's Extract of Meat Co.*, 45 L. T. 757; *Liebig's Extract of Meat Co. v. Anderson*, 55 L. T. 206.

² *Thorley's Cattle Food v. Massam* (interlocutory), 6 Ch. D. 552; 14 Ch. D. 781.

"Thorley's Food for Cattle," made according to a recipe communicated to him, and not known to the public. Josiah Thorley became manager of the business, and had an equal knowledge of the mode of compounding the cattle food with his brother, and had an equal right to use the name of "Thorley's Cattle Food." Joseph Thorley died, and his business was carried on by his executors. Josiah Thorley thereupon formed the Thorley's Cattle Food Company. M., on behalf of the executors, sought to restrain the company from manufacturing and selling the condiment known as "Thorley's Cattle Food;" but the action was dismissed on the ground that M. and the executors had no exclusive right to the title "Thorley's Cattle Food." Later on M. issued an advertisement which concluded with the words, "The proprietors of which are alone possessed of the secret for compounding that famous condiment." The company then moved for an injunction to restrain the issue of this advertisement, and the Court was of opinion that, notwithstanding the decision in a former case, it now had power, by the Judicature Act, sec. 25, sub-sec. 8, to restrain the publication of such an advertisement, but declined to do so upon an interlocutory application. Held, on appeal, that the company were not at liberty to use the name "Thorley's Food for Cattle," unless they took such precautions as would prevent purchasers from supposing that the article sold by them was manufactured at the original establishment of Joseph Thorley.

Agreement to indemnify Printer against the Consequence of a Libel, being Illegal, will not be enforced.—S.¹ was the proprietor of a paper called *John Bull*. At the solicitation

¹ *Shackell v. Rosier*, 2 Bing. N. C. 635.

and request of R., S. inserted the following paragraph in the paper: "Verily the Whigs select choice subjects for the exercise of His Majesty's grace. A few weeks since, the town was astonished at the respite from death of two men who had been found guilty of a murder under circumstances of peculiar atrocity; it was then suggested that the respite was granted to court the favour of the mobocracy of Lambeth, as Lord Palmerston had then some intention of standing for that borough. In the *Times* of Friday is the following from a correspondent: 'Mr. Chalmers, who was convicted of forgery at the sessions of May last at the Old Bailey, has received His Majesty's gracious pardon. . . .' In the former case the murderers were men of such notorious bad character that the officers, when they heard of the deed, immediately proceeded to take them up on suspicion. In this case we know that the crime of forgery was not new to Mr. Free Pardon Palmer Chalmers; and we think we can offer some reason for this act of Whig-Liberal mercy. Mr. F. P. C. was for some time previous to his incarceration on this charge an eminent mob-leader in a small way. The Political Union met within these few weeks to petition for this man's pardon, and he is pardoned accordingly." Thereupon Mr. Chalmers brought an action for libel against S., and recovered damages to the amount of £30. After the proceedings for libel had begun, R. undertook to indemnify the paper against the costs, etc., of the action. A written indemnity was drawn up, but never signed by R. or stamped. Held, that as the consideration for the promise was illegal, S. could not recover the indemnity.

Libel in Book justifies the Printer in repudiating

Contract.—Y.¹ applied to C., who was a printer, to print a second edition of a treatise called “Military Tactics.” This edition was to contain a dedication to Sir William Napier. C. agreed verbally to find the paper and print 500 copies for £4 10s. a sheet. At the time C. commenced printing the treatise, the dedication was not written, but it was afterwards sent to him, and the type set up without his having any knowledge of its contents. After the proof-sheets of the dedication had been revised by Y. and returned by him, C. discovered for the first time that the dedication contained libellous matter, and he refused to complete the printing of it. Y. would not pay for the treatise without the dedication, whereupon C. sued him for printing the treatise. Held, that C. could recover. Pollock, C.B.: “I think that if a contract is *bonâ fide* entered into by a printer to print a work consisting of two parts, and at the time he enters into the contract he has no means of knowing that one part is unlawful, and he prints both, but afterwards suppresses that which is unlawful, there is an implied undertaking on the part of the person employing him to pay for so much of the work as is lawful.”

Unauthorized Use of Name not a Libel by Way of Profession unless it has occasioned Injury.—D.,² a physician and lecturer to a London hospital, was recommended to drink “Sallyco,” a mineral water made by defendant. D. told defendant that nothing seemed to have done his gout so much good as “Sallyco,” but he had been taking other drugs as well, and perhaps Sallyco was getting the credit of it. Subsequently defendant published in a leaflet, copies

¹ *Clay v. Yates*, 1 H. & N. 73.

² *Dockrell v. Dougall*, 15 T. L. R. 333.

of which were circulated as advertisements, the following words, which were complained of as a libel: "Dr. Marger Dockrell, physician to St. John's Hospital, London, and many of the leading physicians are prescribing Sallyco as an habitual drink. Dr. Dockrell says, 'Nothing has done his gout so much good.'" Evidence was given at the trial that the appearance of D.'s name on the leaflet was detrimental to him in his profession, as it was contrary to the rules of the hospital to which D. belonged, and because it made him appear as if he were pushing the sale of Sallyco, contrary to the etiquette of his profession, and would lead his fellow-doctors to ostracize him. The following questions were left to the jury:—(1) Was the matter complained of libellous? (2) If libellous, was it true? The jury found it was not libellous, and gave no finding on the second question. Judgment was given for defendant, and Ridley, J., refused to grant D. an injunction against defendant on the ground that the jury had negatived injury to D.'s reputation or property. On appeal a remark by Lord Selborne,¹ "Could not a professional man be injured in his profession by having his name associated with a quack medicine?" was quoted on behalf of D., but the appeal was dismissed on the ground that the jury had found there was no injury to D. in his profession. *Per* Vaughan Williams, L.J.: "The plaintiff had wholly failed to prove more than a user of his name by defendant. He failed to prove any injury done to him in his property, business, or profession. His lordship said he made these remarks in order to prevent the impression getting about that a person might in an advertisement print of an eminent physician that the latter recommended a quack medicine, when he had done nothing of the sort.

¹ *In re Riviere's Trade Mark*, 26 Ch. D. 48.

He did not mean to affirm anything of the sort, and in such a case the jury would probably award considerable damages, in addition to any remedy to which the plaintiff might be entitled."

Obscure position of Singer's Name in a Concert Advertisement may be Evidence of Damages to Reputation.—R.¹ was a well-known public singer, who was engaged to sing at a concert by N., a concert manager and the owner of the *Musical Exchange Journal and Dramatic Observer*. R. had sung for N. on previous occasions, when she had stipulated for a certain place in the programme, but on this occasion she made no such stipulation. At the same concert N. engaged M., and he undertook to place M.'s name first. In N.'s paper the order of the names of the singers was as follows: "Miss Macintyre, Miss Rose Cavendish, Miss Ella Russell." R.'s husband complained to N. of the position in which her name was placed, and her engagement was cancelled. Subsequently, however, R.'s name was again inserted in the following order: "Miss Macintyre, Miss Rose Cavendish, Miss Ella Russell, and Miss Amy Sherwin." Thereupon R. brought an action for libel against N. and asked for an injunction to restrain the further publication of the paper. It was stated in evidence that the first place in the order of concert singers' names in advertisements was a sign of superior reputation in the profession of public singing, and that the beginning and the end in such announcements as these were superior positions as compared with the middle. The jury found a verdict for R., and assessed the damages at £100. The Court of Appeal affirmed the judgment.

¹ *Russell v. Notcutt*, 12 T. L. R. 195.

CHAPTER VII

COPYRIGHT IN ADVERTISEMENTS

THINGS entitled to copyright have been defined as "works which the author or composer has bestowed some brain-work upon;"¹ and the statutory definition of copyright is "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is in the Act applied."² Copyright cannot exist in works of a blasphemous, treasonable, libellous, seditious or immoral character. In the case of literary works, copyright is wholly statutory, and does not exist at common law, though whether this is true of artistic copyright is unsettled. Originally no protection was given by English law to the work of foreign authors residing abroad, even if such works were first published in England. The International Copyright Act of 1844 provided that an Order in Council might empower authors of books and works of art first published in foreign countries to claim copyright therein within our dominions for certain periods and upon compliance with certain conditions specified in the Order. Great difficulties arose in the application of the Order until, in 1886, a conference of the Powers on the subject was held in Berne. In September, 1887, the United Kingdom, France, Germany, Italy, Spain, Switzerland, Tunis, Hayti, Luxembourg, Monaco, and

¹ Lindley, L.J.

² 5 & 6 Vict. c. 45, s. 2.

Montenegro entered into a Union, under which the author of any literary or artistic work in any one of these countries possesses the same right of copyright throughout the other countries as if the work had been there produced. He possesses no greater right or enjoys no longer term of copyright than in the country of origin of the work, and does not acquire copyright in the other countries until he has complied with all the formalities required by the country of origin.

If, however, a person has lawfully produced in the United Kingdom *before* 1887 the published work of a foreign author, he will be entitled to sell after that date all copies made before that date, but he will not have a right to bring out a fresh edition or print fresh copies after that date.¹ Under sec. 6 of the International Copyright Act of 1886, nothing shall diminish or prejudice any right or interests arising "from or in connection with" the lawful production of any work in the United Kingdom subsisting at the date when the benefits of the Berne Convention were extended to the country of origin of the work. A German picture, registered by an English firm as their trade mark before the Union gave protection to German artists, was held to be included in such "right or interests arising from or in connection with" such work.² Where, however, a German picture had been used for advertising purposes, but not as a trade mark, it was held there had been infringement of the German artist's copyright.³

Copyright exists in published books, periodicals, magazines, newspapers, advertisements, pamphlets, sheets

¹ Cohen's Copyright.

² *Schauer v. Field*, 1893, 1 Ch. 35.

³ *Hanfstaengl Art Co. v. Holloway*, 1893, 2 Q. B. D. 1.

of music, maps, charts, or plans separately published, prints, drawings, photographs, and also in designs for works of ornament or utility. Copyright is conferred on the author of every published book by 5 & 6 Vict. c. 45; and copyright in engravings is now governed by 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57; 6 & 7 Will. IV. c. 59; 15 & 16 Vict. c. 12. By the first Georgian Act, any print on which copyright was conferred had to be engraved, etched, etc., in some part of Great Britain, and duly engraved with the name of the proprietor on each plate, and printed on every such print. Where the engravings form part of a book as illustrations, it is not necessary for the print to bear the name of the proprietor.¹ Under 15 & 16 Vict. c. 12, the provisions of the statutes were applied to "prints taken by lithography or any other process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely." By 25 & 26 Vict. c. 68, copyright is conferred on the authors of original paintings, drawings, and photographs. If these things be made for any other person, the copyright belongs to such person where the thing has been made for a good or valuable consideration. The assignee or purchaser from the author is not entitled to protection unless the copyright is conferred on him by writing, nor does the author retain the copyright unless an agreement in writing reserves it to him. So far as infringement is concerned, the main question turns invariably upon the point, whether the infringing work is a substantial copy of the original. For instance, it was held to be no infringement of an engraving called "The Huguenots," to publish a pattern for Berlin woolwork, consisting of the figures in the picture, because the work was of a wholly

¹ *Bogue v. Houlston*, 5 de G. & S. 267.

different character, and to be used for other purposes.¹ It has been laid down² that one of the principal tests is whether the alleged copy will injure the reputation of the author or affect the commercial value of his work.

Mere registration alone confers no title to copyright. Nor, on the other hand, does the mere omission to register affect the copyright. No obligation is imposed by law on an author to register his copyright. But neither he nor anybody to whom he may have assigned the property can take legal proceedings for infringement of copyright unless such copyright is first registered. In other words, registration secures not the author's copyright *per se*, but the author's right to sue an infringer of his copyright, and the registration may take place after the infringement has occurred. The duration of a copyright varies according to the nature of the subject: literary copyright lasts 42 years, or for the whole of the author's life and 7 years after, whichever period is longer; paintings, drawings, photographs, for the natural life of the author and 7 years after; engravings and prints, 28 years from date of first publication; designs, 5 years. The proprietor of a periodical possesses copyright in such parts of it only as have been composed on the terms that copyright therein shall belong to him, and for which he has actually paid. Such copyright vests in him for the period of 28 years, after which it reverts to the author for the remainder of the 42 years. The purchaser or assignee from the original author is not entitled to copyright in such periodicals, unless it is conferred upon him by writing. Moreover, the author does not in such a case retain the copyright unless he reserves it to himself by agreement in writing;

¹ *Dicks v. Brooks*, 15 Ch. D. 22.

² *Hanfstaengl v. Empire Pabel & Newnes*, 1894, 3 Ch. 109.

and if neither of these things is done, the copyright ceases to exist. The person who has purchased and paid for the copyright must register it at Stationers' Hall under his own name. An entry may be made in the register kept there for that purpose on payment of a fee of 5s. The registration must state (1) the title of the book, or, in the case of designs, a sketch, outline, or photograph of the work (if the proprietor of the copyright desires), or a short description of the nature and subject of the work; (2) the time of the first publication; (3) the name and place of abode of the publisher; (4) the name and place of abode of the proprietor of the copyright. Each new edition of the book must be registered if it is intended to sue for a piracy of it. Like other forms of property, copyright may be assigned by the author to another, in whom it may vest by sale, gift, or bequest. Upon assignment there must in addition be registered (1) the date of the agreement or assignment; (2) the names of the parties thereto; (3) the name and place of abode of the person in whom the copyright is vested by virtue thereof. The requisites to copyright in designs are (1) the design must be new and original; (2) it must be registered; (3) neither the design nor the article to which it is applied must have been previously exhibited, nor any description of it published otherwise than allowed by sec. 57 of 25 & 26 Vict. c. 68; (4) before sale the prescribed number of exact representations or specimens must be furnished to the Comptroller of the Board of Trade.

Originally copyright was confined, so far as books and letterpress are concerned, to works of a purely literary character or form. The preamble of the Act of 1842 declares that the object of the statute was to afford encouragement to the "production of literary works of

lasting benefit to the world ;” and in a recent case Lord Halsbury laid marked emphasis in his judgment on the fact that the Act was intended to apply to purely literary works. The character of the objects which may receive protection under the statute, according to the language of the sections, is much wider than the preamble suggests. Lord Herschell has described the object of the Act as being to “prevent any one publishing a copy of the particular form of expression in which the author conveys ideas and information to the world.” Not long after the Act was passed it became clear that the thing entitled to copyright need not possess a purely literary character or form. At the same time a publication utterly devoid of literary value, such as a cricket scoring-sheet,¹ or a reprint of sporting tips,² has been refused protection. On the other hand, copyright can exist in calendars, itineraries, dictionaries, directories, telegraph codes, illustrated catalogues, and lists of Stock Exchange prices. All these productions were, in the circumstances of the particular cases tried, considered to be the result of literary labour bestowed thereon by persons who were employed for the purpose. A mere collection of names, which any person can collect together without the exercise of literary skill or labour, cannot enjoy copyright, nor can a merely verbal or non-literary description of an article, as contradistinguished from a skilfully worded or literary description. No man can have a monopoly in a language, and no man has an exclusive right to the words which are used in an advertisement. In the same sense, as Lord Bowen once pointed out, a novelist has no exclusive right to the words he employs in the novel ; his right to copyright in the

¹ *Page v. Wisden*, 20 L. T. 435.

² *Chilton v. Progress Printing Co.*, 1895, 2 Ch. 29.

novel is derived from the brain-work he has bestowed on its composition.

For some time a fallacious doctrine was considered binding on the courts, to the effect that an advertisement was incapable of being protected by copyright. This was laid down by Lord Romilly in *Cobbett v. Woodward*,¹ which Jessel, M.R., in a subsequent case,² described as "the case which has done all the mischief." For obvious reasons, such a doctrine is contrary both to common sense and law. Take the case of a firm spending an enormous annual sum on advertising, which may have bought the copyright of Sir John Millais's famous picture of "Bubbles." According to Lord Romilly's doctrine, any rival firm could have employed the picture for the purpose of advertising the same article, notwithstanding the copyright and the heavy figure paid to the artist. The doctrine was discussed and finally discarded in *Maple v. Junior Army and Navy Stores*,³ though slight traces are found in the judgments of other learned judges, *e.g.* Mr. Justice Chitty and Lindley, L.J., and also in the work of an authority like Mr. Scrutton.⁴ The fallacy arose at a time when advertising was in its infancy and of the barest character. At the present moment the art of advertising employs the services of literary men and artists, who supply tales, verses, essays, sketches, and pictures, for the sole purpose of proclaiming the wares of well-known advertisers. It is evident, upon a close examination of the terms of Lord Romilly's judgment, that the dictum he laid down was intended to apply only to cases where the advertisements

¹ 14 Eq. 407.

² *Maple v. Army and Navy Stores*, 21 Ch. D. 369.

³ *Lamb v. Evans*, 1893, 1 Ch. 218.

⁴ *The Law of Copyright*, 4th Ed., 116.

possessed no element of either a literary or artistic character. The following passage from his judgment demonstrates this beyond a doubt: "If you copy the advertisement of another you do him no wrong, unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy. A different rule applies to the letterpress which is said to be copied. Wherever the letterpress bears the traces of original composition it is entitled to protection, but not where it simply describes the contents of a warehouse, the exertions of the proprietor, or the common mode of using familiar articles." The very distinction which Lord Romilly there draws between the literary and non-literary character of advertisements, and which qualifies the principle that his judgment established for a time, had been employed in a previous case, *Hotten v. Arthur*.¹ In that case the subject of copyright was a bookseller's catalogue, containing short accounts of the history of old and curious books, or notices of their contents, and anecdotes respecting them. Lord Romilly's distinction, just quoted, was there anticipated by Page Wood, V.C., who observed: "This is not a mere dry list of names, like a postal directory, court guide, or anything of that sort, which must be substantially the same by whatever number of persons issued, and however independently compiled." The case of *Hotten v. Arthur*,¹ however, was not quoted to Lord Romilly, whose loosely worded dictum prejudiced advertisers a good deal in subsequent cases. In *Lamb v. Evans*,² Chitty, J., accepted Lord Romilly's doctrine that an advertisement could not be subject of copyright, but on the ground that the copyright might be vested in the newspaper owner, who might thus prevent the advertiser from

¹ H. & M. 603.² 1893, 1 Ch. 218.

inserting the advertisement in another paper. This reasoning commended itself to Lindley, J., when the case was renewed in the Court of Appeal. It remained, however, for Bowen, L.J., who delivered the next judgment, to expose the whole fallacy with characteristic lucidity of language. He said: "With regard to the advertisements . . . I am by no means satisfied that Mr. Justice Chitty did not take, on this interlocutory motion, rather a narrower view of the law of copyright as applicable to these advertisements than probably he would take at the trial. It is perfectly true that each separate advertisement may not have become, in its separate form and as a distinct entity, the copyright of the plaintiff; but he still might have a copyright in respect of the collocation and concatenation of the advertisements, just as, I believe, the proprietors of the *Times* would have copyright in a sheet of advertisements." In *Grace v. Newman*,¹ Hall, V.C., held that a stonemason's advertising catalogue, consisting of lithographic sketches of monumental designs, was capable of copyright. The view that copyright could exist in an advertisement was finally established in *Maple and Co. v. The Junior Army and Navy Stores*,² where Jessel, M.R., declared he could find no principle to support Lord Romilly's doctrine, which was against "the weight of authority."

Copyright in Bookseller's Catalogue.—H.,³ a bookseller, issued catalogues of his old and curious books. The catalogues were not mere lists of the books and their prices, but contained, in a great majority of instances, short accounts of the history of the books, or notices of their contents, and anecdotes respecting them. These

¹ 19 Eq. 623.

² 21 Ch. D. 369.

³ *Hotten v. Arthur*, 1 H. & M. 603.

were, according to H., partly "the emanations of his own mind," and partly compilations by him from materials supplied him by others, but in all cases strictly "original matter" in the sense in which the term is used in relation to copyright. A., a bookseller, issued a catalogue which was in great part copied verbatim from H.'s catalogue. H. applied for an injunction. It was pleaded on behalf of A. that the work was not offered for sale itself, but merely used to promote the sale of the books mentioned in it, and that copyright could not exist in a bookseller's catalogue. Injunction granted. *Per* Page Wood, V.C.: "I cannot conceive on what principle it is supposed that there is no copyright in a catalogue such as this. This is not a mere dry list of names, like a postal directory, court guide, or anything of that sort, which must be substantially the same, by whatever number of persons issued and however independently compiled."

Lord Romilly's Doctrine that an Advertisement could not be Subject of Copyright laid down.—C.¹ was an upholsterer and house-furnisher at Deptford Bridge. In 1866 he published a work on the subject of furnishing and furniture, under the title, *Cobbett & Co.'s New Furnishing Guide, or The Illustrated Furnishing Guide*, containing an introduction and remarks on housekeeping, written by C. himself, with numerous engravings, and illustrations of designs and articles of furniture which were sold by his firm. These engravings, according to C., represented designs and patterns of articles, the drawings of which were specially made from goods manufactured and sold by C. C.'s work was registered as a new publication.

¹ *Cobbett v. Woodward*, 14 Eq. 407.

W., who carried on a similar business at Worcester, printed and published a book bearing the titles, *F. Woodward & Co.'s Illustrated Furnishing Guide, or New Furnishing Guide*, as a new and original work; but C. alleged it was in a great measure copied and taken from C.'s book, and to a considerable further extent was in its style and plan, as well as in particulars, a colourable imitation thereof, and passages were cited from the introduction and other parts of W.'s book in part identical or very similar to certain passages in C.'s book. C. also alleged that W. had copied and appropriated 50 out of 123 illustrations in C.'s book. For the defence it was pleaded that it had been the practice of furniture manufacturers for many years to publish such guides, and that W. himself compiled and printed one in 1864. The designs and patterns of articles of household furniture were, with rare exception, in common use throughout the trade; moreover, the illustrations in the guides issued by different manufacturers were generally the same in outline and design, and were frequently identical. C. sought to restrain W. by injunction from publishing the guides, but the court refused it. It was held that there was no copyright in a descriptive advertisement, illustrated or otherwise, of articles which any one might sell. *Per Lord Romilly, M.R.* : "If a man, not being a vendor of any of the articles in question, were to publish a work for the purpose of informing the public of what was the most convenient species of articles of house-furniture, or the most graceful species of decorations for articles of house-furniture, what they ought to cost, and where they might be bought, and were to illustrate his work with designs and with drawings of each article he described—such a work as this could not be pirated with impunity, and the attempt to

do so would be stopped by the injunction of the Court of Chancery; yet if it were done with no such object, but solely for the purpose of advertising particular articles for sale, and promoting the private trade of the publisher by the sale of articles which any other person might sell as well as the first advertiser, and if, in fact, it contained little more than an illustrated inventory of the contents of a warehouse, I know of no law which, while it would not prevent the second advertiser from selling the same articles, would prevent him using the same advertisement, provided he did not in such advertisement by any device suggest he was selling the works and designs of the first advertiser. At the same time, I am bound to say that where it is shown that the second advertiser has been making use literally of the drawings of the first advertiser, and copying them precisely, I think that the court, though it could not stop him from taking that course, must feel that a use has been made of the works of the first advertiser which would not be considered fair amongst gentlemen, nor amongst fair traders, and would not give the costs to the man who deliberately endeavours to profit by the exertions of his fellow-tradesmen. But at the last it always came round to this—that, in fact, there is no copyright in an advertisement. If you copy the advertisement of another, you do him no wrong unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy. A different rule applies to the letterpress which is said to be copied. Wherever this letterpress bears the trace of original composition it is entitled to protection, but not where it simply describes the contents of a warehouse, the exertions of the proprietor, or the owner's mode of using familiar articles."

Why Lord Romilly's Doctrine is now Discarded.—M.,¹ a firm of upholsterers, published an illustrated catalogue of articles of furniture which was duly registered under the Copyright Acts as a book. The illustrations were engraved from original drawings made by artists employed by M., but the book contained no letterpress of such a description as to be the subject of copyright, and it was not published for sale, but was used by M. as an advertisement. J. published an illustrated catalogue, many of the illustrations in which were copied from M.'s book. Held, by the Court of Appeal (over-ruling *Cobbett v. Woodward*) that M. was entitled to an injunction restraining J. from publishing any catalogue containing illustrations copied from M.'s book. A collection of prints published together in a volume is a book within the meaning of the Copyright Acts, and the proper subject of copyright, though it contains no such letterpress as could be the subject of copyright, and it makes no difference if the book is not published for sale, but only used as an advertisement. Hall, V.C., drew attention to the fact that the case of *Hotten v. Arthur* had not been drawn to the attention of Lord Romilly in *Cobbett v. Woodward*, and continued: "I do not see any reason to think it improbable that if *Hotten v. Arthur* had been called to his attention he would have said, 'I cannot agree to the proposition that an advertisement cannot be the subject of copyright.' I think, so far as my judgment is concerned, that the proposition I have referred to was not a correct one; and the Master of the Rolls thought it was at the bottom of the case before him. Now, can there be copyright in an advertisement? It has been submitted that, consistently with what I decided in *Grace v. Newman*, it might be said

¹ *Maple & Co. v. Junior Army and Navy Stores*, 21 Ch. D. 369.

that there was copyright there, and that this might have sustained my judgment, even if it were in other respects wrong; but without stating that there is something equivalent to it in this case in the passages which have been read to me from the catalogue and in comparing the catalogues, I am certainly prepared to hold that for the present purpose its being an advertisement, considering it as an advertisement, is not a reason why the catalogue is not a book within the meaning of the statute. It is a book in itself, and a book is a thing which the statute protects. There is no clause in the statute which limits the operation of the word 'book' in such a way as that it shall not apply to such advertisements. *Prima facie*, therefore, I hold that the decisions are in favour of the protection of the statute being extended to such advertisements." The judgment was affirmed on appeal. Jessel, M.R., expressly declared in the course of his judgment that Lord Romilly's view that there could be no copyright in an advertisement was wrong. "The case which has done all the mischief is *Cobbett v. Woodward*. . . . I think that (Lord Romilly's view) this is not the law. I am not aware that the use to which a proprietor puts his book makes any difference in his rights. His copyright gives him the exclusive right of multiplying copies, and he may use them as he pleases. I think, therefore, that *Cobbett v. Woodward* will not bear legal examination. . . . The weight of authority there is against the doctrine that there cannot be copyright in a book issued as an advertisement, and I cannot see any principle in support of that doctrine." Lindley, J., ". . . I cannot follow Lord Romilly's reasoning founded on the book being an advertisement."

Subject of Copyright.—G.,¹ the proprietor of a business known as “Daniel’s,” stone and marble mason, at Highgate and Nunhead, published in 1870 a book containing 164 lithographic sketches of monumental designs, which was compiled by W., the manager of the business at Highgate. The book contained scarcely any letterpress. The sketches were taken from different tombstones in cemeteries by means of photographs and drawings, and great skill was expended in their production. The volume was intended by G. as an advertisement, and to be given to customers for the purpose of selecting a design which G. would be able to execute. The preparation of the book occupied nearly a year, and it was registered by G. at Stationers’ Hall. N., a wholesale manufacturing stationer and lithographer in London, employed a traveller, who called on G. at Nunhead and offered a lithographed sheet of monumental designs for masons, for which he solicited orders. It was discovered that the designs were copies of G.’s, and that N. had been soliciting orders for the sheet from the principal cemetery masons in London and the country. G. then applied for an injunction to restrain N. from publishing designs copied from it. Held, that G. had copyright in the book, and was entitled to the injunction; that a tradesman who employs another for remuneration to compile a book of designs for him is himself entitled to copyright in the book; that a book in the nature of an advertising catalogue may be the subject of copyright.

Heading of Advertisements, being the Result of Literary Skill and Labour, protected by Copyright.—L.² had for many

¹ *Grace v. Newman*, 19 Eq. 623.

² *Lamb v. Evans*, 1893, 1 Ch. 218.

years published "The International Guide to British and Foreign Merchants and Manufacturers," which had gone through several editions, and was registered at Stationers' Hall. It had a continental section, which contained a list of continental traders who desired to advertise in this book. These advertisements, the insertion of which was generally paid for by the traders, were arranged under special headings denoting the nature of the businesses, which were placed alphabetically, as, for instance, "Absinthe," "Brush Manufacturers." Each heading was given in English, French, German, and Spanish, and under it the names of the traders who came within it were alphabetically arranged. In some cases only their names and addresses were given. In other cases more elaborate advertisements were furnished, containing descriptions of the articles in which the advertiser dealt, and representations of trade marks and of medals gained by him at exhibitions. Each descriptive advertisement was accompanied by an English translation. The English headings were prepared by L., or by persons employed and paid by him to do it, and the translations of them were paid for by him. E. was employed by L. to canvas for advertisements in a certain district of the continent. At the end of the period of E.'s employment, E. entered into the service of a rival publication, "The Commercial Directory," and assisted in adding thereto a continental section. L., considering that his rights were interfered with, brought his action against E. and the proprietors of the "Commercial Directory." The action was tried by Mr. Justice Chitty, who was of opinion that L. had copyright in the headings, but not in the advertisements, and granted an injunction, until judgment or further order, restraining E. and the proprietors of the "Commercial Directory" from "printing,

selling, or publishing any copy or copies, or so much of L.'s book in the writ mentioned as consists of headings (not forming part of advertisements therein) so as in such way to infringe L.'s copyright in such headings." The defendant appealed, and it was contended on his behalf that there cannot be any copyright in advertisements, and the headings were a mere part of the advertisement. Held, by the Court of Appeal, that L. had a copyright in the headings, and that though it was necessary under 5 & 6 Vict. c. 45, s. 18, that they should have been composed on the terms that he should have the copyright, this condition was satisfied, because the fair inference from the circumstances of the case was that they had been composed on those terms. And *semble*, that although L. could not have copyright in a single advertisement, inasmuch as the advertiser must be at liberty to insert it elsewhere, L. had copyright in the mass of advertisements as arranged. Lindley, L.J.: "I do not myself see the difficulty in a publisher having a copyright in a sheet of advertisements. I do see a difficulty in his having copyright in one advertisement, because, as Mr. Justice Chitty pointed out, that might prevent the advertiser from republishing his advertisement in another paper. But to say that it follows from that, that the proprietor, say of the *Times*, has no copyright in a sheet of advertisements, so that he cannot restrain anybody from copying that sheet, appears to me a very different proposition." Bowen, L.J.: "That they (the headings) are the subject of copyright I do not think can be disputed. They are the result of literary labour, both as regards the composition of the headings themselves and their collocation or concatenation in the book. . . . With regard to the advertisements, though it is not necessary to decide that, I am by no means satisfied that Mr. Justice Chitty did not

take on this interlocutory motion rather a narrower view of the law of copyright as applicable to those advertisements than probably he would take at the trial. It is perfectly true that each separate advertisement may not have become in its separate form and as a distinct entity the copyright of the plaintiff; but he still might have a copyright in respect of the collocation and concatenation of the advertisements just as, I believe, the proprietors of the *Times* would have copyright in a sheet of advertisements. Although they would not have a right of preventing any person who furnished them with an advertisement from inserting it in some other paper, because from the nature of the case it would be obvious that they did not receive the advertisement upon the terms that they should have the copyright, yet, nevertheless, they would, I think, have a right of action against any other paper that took a whole sheet of advertisements as arranged appearing in the *Times*, or a substantial part of it with the advertisements, and reprinted and republished it.

A Newspaper is a Book for Purposes of Copyright.—W.¹ published in the *Times* a memoir of Lord Beaconsfield. H. reprinted it in pamphlet form, which he advertised for sale as being “reprinted from the *Times*.” W. and the other proprietors of the *Times* sought an injunction to restrain H. from publishing it or advertising it for sale. There was no evidence that the proprietors of the *Times* had purchased or were entitled to the copyright in the memoir, beyond the fact that they had paid the author for his literary services in respect thereof, and the author was not a party to the action. The *Times* was not registered at Stationers’ Hall under the Copyright Act

¹ *Walter v. Howe*, 17 Ch. D. 706.

(5 & 6 Vict. c. 45). Jessel, M.R., held, that a newspaper came within the definition of a book in sec. 18, and therefore the plaintiff, in order to succeed, must have been registered under the Act.

Registration of Copyright in Name of Agent or Manager is invalid.—P.,¹ a printing and publishing company, of which W. was managing director, published a trade catalogue or circular, called “The Art of Dressing Well.” It contained, among other drawings, the two drawings of gentlemen in Chesterfield coats, as well as certain printed matter describing and advertising articles of clothing. The copyright in both the book and the drawings was registered in the name of W., who had carried on the business before the incorporation of the company, who had written all the letterpress, and who was registered proprietor of the copyright in all books and drawings used in the business. T., a printer, and B., a firm of clothiers, infringed the copyright in the books and drawings, and P. sought an injunction. Defendants pleaded that W. was not in fact the owner of the copyright, and that the registration was invalid. There was no evidence of any resolution having been passed by P. or agreement made that W. was to be trustee for P. of the copyright in the book and drawings. Held, that the action was not maintainable, since registration in the name of a person who is a mere agent or nominee of the proprietor of the copyright, and not a trustee for the copyright for him, is bad. Registration of a book under the Copyright Act, 1842, in the name of the author of the letterpress does not confer any protection in respect of drawings which are introduced into the book as

¹ *Petty v. Taylor*, 1897, 1 Ch. 465.

illustrations, and the art copyright in which is vested in other persons.

Where there is no Agreement in Writing, Sale of Picture gives Copyright to neither Vendor nor Purchaser.—L.,¹ a chromo-lithographer, was reading *A Midsummer Night's Dream* one evening, when he came across the well-known passage (Act 3, sc. 1): "Good Master Mustard-seed, I know your patience well: that some cowardly, giant-like ox-beef hath devoured many a gentleman of your house: I promise me, your kindred hath made my eyes water ere now. I desire your more acquaintance, good Master Mustard-seed." On reading these lines it occurred to him that the words, accompanied by a suitable illustration, would form a good label or trade-mark for a firm of mustard manufacturers. His artist prepared an oil-painting of a moonlight scene, in which a sprite was pictured presenting a tin of something—presumably mustard—to Bottom and Titania, who were seated on a green bank with Puck hovering over their heads. In the lower part of the picture were a label containing the Shakesperian lines and the word "Mustard." C., a firm of mustard manufacturers, after some negotiations, ordered 250,000 reduced coloured copies as labels for their mustard tins, the shape of the tin held by the sprite being altered so as to represent one of the book-shaped tins used by C., and C.'s name being fixed above the moon in the picture. From the picture so altered, the labels ordered were supplied by L. The picture itself remained in the possession of C. A second issue of the labels was printed by L. for C. at a reduced rate. Subsequently C. employed other people to print similar labels. L. then claimed that he had registered

¹ *Levi v. Champion & Co.*, 3 T. L. R. 286.

the copyright in the picture, and that C. was committing an infringement of his copyright. Kekewich, J., held that during the negotiations L. intended to sell the picture, and C. to buy it; that the property passed to C., and therefore that a person so selling was not entitled to the copyright. C. did not claim the copyright in the picture, but L. had not got it—that was to say, he had not got the sole or exclusive right, and therefore could not prevent C. and other persons from multiplying copies.

Copyright in Articles contributed to Encyclopedia belongs to Author, unless otherwise agreed.—A.¹ approached L. and B., a firm of publishers, with a scheme for the completion of an encyclopedia of sport. They came to terms, and A. was employed to edit it. He was to be remunerated for his editorial services by a lump sum, for which he was to contribute certain articles without further fee. No provision as to copyright was contained in the agreement. Later on L. and B., without the knowledge and consent of A., published a book containing copies of the articles. Held, there were no special circumstances either in the nature of the publication or in the terms of the employment to warrant the inference that the copyright in the articles contributed by A. was to belong to L. and B., and an injunction was granted to restrain L. and B. from publishing the articles in a separate form.

Lawful Production of Work prior to the International Copyright Act protected by Sec. 6.—S.,² a German, owned the copyright in an oil-painting called “Lisetta,” produced in Germany before December, 1885. In January, 1887,

¹ *Aflalo v. Lawrence & Buller*, 1902, 1 Ch. 264.

² *Schauer v. Field, Ltd.*, 1893, 1 Ch. 35.

F., a firm of candle manufacturers, registered as their trade-mark a photograph of "Lisette" on a small scale, with their name and the words "trade-mark" across the picture. This trade-mark was extensively used by F. on their goods, and reproduced on show-cards and trade-lists for the purpose of advertising. In December, 1887, the benefit of the International Copyright Act of 1886 was extended to Germany. In January, 1892, S. registered himself as the owner of the photographic copyright in "Lisette," and sought to restrain F. from infringing his copyright by continuing the use of the show-cards, admittedly produced subsequently to December, 1887. F. pleaded that, prior to the extension of the act to Germany, he had acquired such an interest in the trade-mark as is protected by sec. 6 of the Act, which enacts that nothing shall diminish or prejudice any right or interests arising from or in connection with the lawful production of any work in the United Kingdom subsisting at the date of the order in command extending the Act to Germany. Held, that F., as the proprietor of the trade-mark, a work lawfully produced before December, 1887, had an interest in advertising it as they had done by means of the show-cards and trade-lists: that this was an interest arising from or in connection with the trade-mark itself, and that F. was consequently protected by sec. 6.

CHAPTER VIII

AGENCY AND COMMISSION

SOMETIMES an advertiser entrusts the whole work of advertising his wares to an agency of advertising experts; other traders employ an advertising agency merely as intermediary between themselves and the organs of popular opinion; some producers or advertisers set up in connection with their business a special branch dealing with the work of popularizing their wares or products. When an advertiser becomes insolvent the question arises, Is the agent through whom he has issued his advertisements to the newspapers liable to the latter for the debts so contracted? If an agent is employed to bring two parties together, and drops out when he has fulfilled that function, the third party and the principal are face to face and no liability attaches to the agent. When an agent enters into a contract for a principal whose identity is disclosed to the third party, the agreement is construed on the basis that the principal is presumably the contracting party and not the agent. Against this, however, must be set the general rule that when a person signs a contract in his own name without qualification he is on the face of it to be treated as principal. Where in other parts of the document it is clear that he did not intend to bind himself as principal, he incurs no liability. An agreement was signed, "C. D. as agent for E. F." In the

body of the contract there was nothing inconsistent with this subscription. It was held that C. D. did not sign as principal.¹ And the contract ran: "We have this day sold you an account of J. M. & Co., etc. etc., J. C. H. & Co." The contract here showed that it was signed by the agent with qualification, and it was held that the agents were not liable.² In some cases either the principal or the agent may be sued at the option of the third party; but if credit is given to the agent the third party cannot sue the principal, for a principal is discharged from liability by the election of the third party to give exclusive credit to the agent who made the contract.³ Where an advertiser becomes insolvent, the liability for the debt incurred in publishing his advertisement rests either upon him as the person to whom the third party looked for payment, or upon the advertising expert who acted as the agent. If the latter has sent the advertisement to the newspaper or magazine, the whole question of liability turns on the terms of the contract. Where an advertising agent signs a contract in a representative capacity, the fact should be made perfectly clear on the face of the written agreement; when a person signs a contract in his own name without qualifications, it raises a presumption of law that he is contracting personally and not as an agent on behalf of his principal.⁴ All advertisement contracts are not drawn up in clear language, and it is sometimes difficult to say whether the agent signed the letter in his representative or in his personal capacity. An agent in contracting on behalf of his principal may intend to pledge his own

¹ *Deslandes v. Gregory*, 30 L. J. Q. B. 36.

² *Gadd v. Houghton*, 1 Ex. 357.

³ *Paterson v. Gandasequi*, 15 East. 62.

⁴ *Stewart v. Shannessy*, 2 F. 12.

credit, or he may execute the contract in such a manner as to estop himself from denying that such was his intention. Or he may contract in such terms or otherwise act in such a way as to prevent himself from raising the contracting plea. He may write the letters which are partial evidence of the contract without making any reference to the advertiser, and sign them with his own name without any qualification or without any allusion to his representative capacity. If an advertising agent authorizes the insertion of advertisements in this manner, making no reference to the advertiser and no qualification to his signature, it is clear that he is personally liable on the contract. Whether the principal is disclosed or not makes no difference; and the magazine proprietor may, as a general rule, elect to charge either him or his principal. But as soon as he has made his choice he is bound by it. If the magazine proprietor in his accounts debits the agent instead of the principal, that is, gives credit to the agent and not to the principal, it means that he has consented to look to the agent alone for the payment of the account, and he is thereby precluded from looking to the principal. If, therefore, an agent enters into a contract without naming the advertiser as the person to be responsible, the agent is liable for the debt, and the law will so hold him in the event of his being sued. In the case of *Hawkins v. Thuxford*¹ (the facts in which are set out in Chapter III.), the defence was raised that an advertiser who had sustained injury through breach of contract on the part of the newspaper in omitting his advertisement had sent the advertisement through an agent, that the contract was made between the agent and the newspaper, and therefore that the advertiser had no right of action.

¹ *Times*, Dec. 23, 1867.

The only report of the case¹ extant contains no reference to the facts on which this contention was based, but presumably the letter written by the agents showed that they were acting in a representative capacity.

Apparently conflicting decisions have been given in many cases where advertising agents and canvassers have sought to recover the commission due to them in respect to advertisements obtained by them in the first instance. Advertisements are of two kinds: (1) where the order for their insertion is unlimited in point of time, except by the words "until countermanded;" (2) where the order is for a specified period, and then lapses or is renewed. A good deal of controversy exists in the trade as to the rights of canvassers to commission upon orders which are renewed after their agency has ceased. In the first reported case, *Nayler v. Yearsley*,² the canvasser claimed to be paid commission on all advertisements received at any time from the customers he had originally obtained for the paper. According to the report, the canvasser was "to have his renewals *as long as they continued*," and the judge took down the italicized words as meaning "as long as the plaintiff and the defendant should continue together." Later on, the canvasser was told to do no further business for the paper, but he sued for commission upon the advertisements inserted after his dismissal. The form of pleading on which the canvasser rested his case alleged merely that he had been dismissed without reasonable notice, and thereby been deprived of his commission. On the facts of the case the judge held that the defendant had failed to make out his case. The next case in point of date is *Boyd v. Mathers*,³ where, under

¹ *Times*, Dec. 23, 1867.

² 2 F. & F. 41.

³ 9 T. L. R. 443.

the agreement, the canvasser was to receive 25 per cent. commission on initial and renewal orders for the advertisements he obtained—"commission payable on acceptance of order, balance quarterly, as accounts are paid." A quarter's notice to terminate his engagement was given to the canvasser, and accounts were settled as to his commission up to that time. The main question raised in the case was whether the canvasser was entitled to commission in respect of renewals of advertisements inserted in the paper after the termination of his employment. In the Court of Appeal it was held that the contract was to pay the canvasser commission in respect of his services, and after he had ceased to be in a position to render such services he was not to receive anything. It will be noticed in this case that the canvasser's employment was terminated by notice. Where the contract under which the agent renders his services is unlimited or indefinite in point of time, the courts have construed it as meaning that the agreement to pay commission was intended to operate even after the canvasser was dismissed, unless it is established that, according to the custom of the trade, the engagement is terminable by a reasonable notice.¹ In some kinds of agency the business on the first occasion which the agent may do is of small pecuniary value, and the commission thereon therefore small; but there is a strong probability of future business resulting. In such businesses, if the principal could by paying a small commission take advantage of the first introduction, and then refuse to recognize subsequent transactions as floating from it, the agent would be practically cheated of the results of his labour. It is for this reason usual in this class of business to arrange that the

¹ *Bettany v. Eastern Morning News*, 16 T. L. R. 401.

agent shall have commission on all subsequent business done by the principal with the person originally introduced by the agency. Where the agreement provides that the commission shall be payable on all subsequent business, the obligation to pay such commission continues, though the agent may have been dismissed from the agency. The tendency of the courts in several cases, notably in *Bilbee v. Hasse*,¹ *Saloman v. Brownfield*,² *Faulkner v. Cooper*,³ has been to construe agreements which place no limit in point of time to the services of the agent as an implied contract to pay commission on subsequent business. Where it is clear from the agreement or the circumstances of the case that the parties intended to dispense with each other's services by reasonable notice, the courts have invariably decided that the right to future commission ceases with the termination of the agency.⁴ In *Bilbee v. Hasse*,¹ Lopes, L.J., made a declaration that the agent was entitled virtually to an annuity under an agreement to pay him subsequent commission, but both in *Saloman v. Brownfield*² and *Faulkner v. Cooper*,³ Mathew, J., held that that was not the right mode of dealing with cases of this kind, and treated the matter as a claim for damages for breach of contract. In arriving at a conclusion on that point there must be taken into account the chances of human life, the vicissitudes of trade, the probability of the customers ceasing to deal with the principal, and "various other considerations." In *Bellamy v. Eastern Morning News*⁵ an advertisement canvasser, who was claiming commission on advertisements inserted after the

¹ 5 T. L. R. 677; *Times* newspaper, Jan. 16, 1890.

² 12 T. L. R. 239.

³ 4 Com. C. 213.

⁴ *Kelly v. Croft*, 14 T. L. R. 348.

⁵ 16 T. L. R. 401.

termination of his agency, alleged that he was entitled to such commission by the custom of the trade; but the custom was disputed, and Mathew, J., held that the plaintiff had failed to establish it. It follows from *Barrett v. Gilmour*¹ that, even where the contract to pay commission to an agent is indefinite in point of time, custom of the trade may make the engagement terminable, and where such custom is established by evidence the right to future commission ceases with the agent's employment. Where an advertisement canvasser has obtained blocks or other materials in the course of his agency, he cannot, after his employment ceases, use such materials to the detriment of his former principal.²

Where Contract indefinite in Point of Time, Custom of the Trade may make Engagement terminable.—In 1896 B.³ was appointed by G. to act as the latter's traveller or representative in certain towns in the Midlands. The terms of his appointment were contained in a letter, which did not either fix the engagement for any particular period or provide for the termination of the employment by notice or otherwise. B. was to receive 4 per cent. commission on all business done by means of orders obtained by B. at the customer's place of business, on all orders given by the customers direct to B., and on all orders which G. received by "letter orders." B., who continued to act as G.'s representative down to 1899, had a connection in the towns he worked in, and thus got orders for G. In July, 1899, G. gave notice to terminate B.'s engagement in the following December. B. contended

¹ 17 T. L. R. 292.

² *Lamb v. Evans*, 1893, 1 Ch. D. 219.

³ *Barrett v. Gilmour*, 17 T. L. R. 292.

that the engagement could not be terminated by notice, and claimed a declaration on all orders executed by G. after December, 1899, obtained through B.'s agency. The defence set up for G. alleged that it was the custom of the trade to terminate such engagements as B.'s by notice, and that after the employment ceased the traveller was never paid any commission. Several witnesses engaged in the trade, who were called by G., gave evidence to this effect. Phillimore, J., gave judgment for defendants, holding that the evidence clearly established that B.'s engagement could be terminated by notice, that the notice given by G. was sufficient, and that B. was not entitled to be paid any further commission.

Where Claim to subsequent Commission rests on Custom, Usages of Trade must be established by Evidence.—B.¹ acted as the advertisement agent in London for some provincial newspapers owned by E. He was paid a commission of 10 per cent. upon all advertisements obtained in London for the newspapers. In June, 1898, E. terminated B.'s engagement after notice, and paid him commission up to Christmas, 1898, on all advertisements published in their papers which had been originally obtained by him. B. brought an action to recover commission due to him on advertisements published since Christmas, 1898. B. alleged that he was still entitled by the custom of the trade to commission on all advertisements which might appear in E.'s papers if they had been obtained by him in the first instance. It was contended that the custom applied to two classes of advertisements: (1) where the publication was required by the advertiser to continue until countermanded; (2) where the publication is for a

¹ *Bettany v. Eastern Morning News*, 16 T. L. R. 401.

definite period, and then either lapses or is renewed, provided that in the case of renewals the renewal was made within twelve months from the previous publication. For the defence it was denied that there was any such custom as alleged. Witnesses were called on both sides as to the alleged existence of the custom. Mathew, J., said the question was whether the alleged custom had been proved. It had been laid down over and over again that the way to prove a custom was to show an established course of business, at first contested but ultimately acquiesced in. A number of witnesses had been called to prove the custom. First, there was the plaintiff himself, who admitted in cross-examination that it might not be quite fair that the payment of commission should go on for more than three or four years, although he said that the custom justified him in saying that the commission was payable for all time if the publication of the advertisements continued. Several of the plaintiff's witnesses were obliged to admit that they knew of no instance where the supposed custom had been acquiesced in by newspaper proprietors. On the case before him he was of opinion that the evidence of the alleged custom was most unsatisfactory. Defendants' witnesses said that vague claims were made from time to time, but they were always stoutly resisted. He held that the custom had not been proved, and gave judgment for defendant with costs.

Where Agreement provides for Notice of Dismissal, Right to Commission ceases with Termination of Employment, unless otherwise provided for.—K.¹ was appointed agent by C. to obtain customers. Under the agreement he was to receive 2½ per cent. commission on all orders from

¹ *Kelly v. Croft*, 14 T. L. R. 348.

customers whom he introduced to the firm. It was a term of the contract that the agreement might be determined by mutual consent, six months' notice to be given by either party. The relations between the parties continued satisfactory for five years, and then the agreement was determined by C., who dismissed K. C. admitted K. was entitled to commission up to the time of his dismissal, but K. claimed he was still entitled to commission on orders obtained through his introduction after his dismissal. Day and Phillimore, JJ., held that C. was entitled to judgment. "This was not a case in which the defendant could have dismissed the plaintiff without his consent. The agreement was to last until determined by mutual consent. It had been so determined, and therefore the plaintiff was not entitled to receive commission after such determination."

Refusal to pay Subsequent Commission on a Contract unlimited in Point of Time is a Breach of Contract remedied by Damages.—By¹ a verbal agreement made in 1884 between F., a shipping agent, and C., F. was appointed agent to procure and introduce customers to deal with C., and it was agreed that C. should pay F. a commission of 2½ per cent. upon the price of all goods ordered of C. by such customers. F. continued to act as agent for C. until 1894, when C.'s business was taken over by a company as a going concern. The agreement with F. was adopted and acted upon by the company. In 1898 the company gave F. three months' notice to terminate his employment as agent on May 31, 1898. F. was paid all commission due to him up to that time. The company continued, after May 31, to do business with customers who had been introduced

¹ *Faulkner v. Cooper*, 4 Com. Cases, 213.

by F. during his agency, but the company had not rendered to F. any account, or paid him any commission in respect thereof. F. claimed among other things a declaration that F. was entitled to commission on all future orders accepted by the company from customers introduced by F. during his employment as agent. Mathew, J.: "I am satisfied as to the mode in which I ought to deal with this case. The plaintiff now asks for a declaration. . . . That would be in effect giving him an annuity. In my opinion that is not the right way of dealing with a case of this kind. The company by their contract with plaintiff agreed to pay him a commission on all business done with customers obtained through the plaintiff's introduction. The company have now ceased to employ the plaintiff as their agent to introduce customers, but they still deal with the customers who were introduced to them by the plaintiff when he was acting as their agent, and they contend that they are not now bound to pay the plaintiff commission on the business done with these customers since the termination of the plaintiff's employment as agent. The defendants are not bound to continue dealing with these customers, but if they do so they are bound by the terms of their contract with the plaintiff to pay him his commission. Now, this is a free country, and the defendant company had a perfect right to break their contract with the plaintiff if they pleased, but they can only do so on the usual conditions, that is to say, they must pay damages for the breach of contract. The question in this case must therefore, in my opinion, be treated solely as to what sum is to be paid to the plaintiff by the defendant company as damages for the breach of contract. In deciding that question, I have to consider what amount of commission would have been earned by the plaintiff if the relations

between him and the defendant company had not been broken off, and in arriving at a conclusion upon that point I must take into account the chances of human life, the vicissitudes of trade, the probability of the plaintiff's customers ceasing to deal with the defendant company, and various other considerations." [His lordship fixed the damages at £350.]

Where Agreement is unlimited in Time, no other Term can be imported into the Contract.—B.,¹ pottery manufacturers, who had carried on business in Australia for some years, asked S. to go out to Australia and travel for orders for them. S. agreed to do so upon the terms that he was to get $7\frac{1}{2}$ per cent. upon the net amount of cash in payment of goods, orders for which were obtained through him, also $7\frac{1}{2}$ per cent. upon all orders from customers introduced by him on payment being made by them, whether such orders were obtained through S.'s representations or not. S. went out to Australia and obtained a number of orders which were executed, and upon which he received his commission down to the end of 1894. On February 26, 1895, B. gave S. three months' notice to determine his employment, whereupon S. made a claim to be paid commission upon all orders from customers in Australia introduced by him as the contract was indefinite as to time. Mathew, J., made the declaration S. asked for, saying: "There was no difficulty in interpreting the contract. No period was put to the duration of the contract, the reason being that payment should be made upon all orders received from customers introduced by S. It was said the contract was only to last a reasonable time, or until it was ended by a reasonable notice. He saw no

¹ *Saloman v. Brownfield*, 12 T. L. R. 239.

reason to import that into the contract. It was open to the defendants to cease to deal with the customers introduced."

Implied Term of Contract to pay Subsequent Commission is a Question of Fact which the Jury may Negative.—M.,¹ an engineers' sundryman, was engaged by H., manufacturing engineers, as their agent to solicit orders for shafting, pulleys, etc. The contract was contained in a letter written by H. to M., which contained the following (as well as a list of firms who were likely to become purchasers on whom M. was to call): "We shall be pleased to allow you 5 per cent. discount on all orders received from the firms named (except those marked 'not call'), and on any fresh ones you can introduce." M. worked on these terms from the date of the agreement, February 16, 1887, till February, 1895. Besides obtaining orders from firms named in the list (41 of whom had not done business with H. before), he claimed to have introduced 183 entirely new customers, and to have obtained orders amounting to £694 in 1887, increasing in amount each year till they reached £6452 in 1894. In February, 1895, a dispute arose, and in consequence M. was dismissed on March 8, his commissions being paid up to April 8. The jury found, as a fact, that it was not an implied term of the contract that M.'s commission should continue after his dismissal, and judgment was given for H.

Where Agreement is Unlimited in Point of Time, Right to Future Commission does not cease with Dismissal.—B.,² a

¹ *Morris v. Hunt & Co.*, 12 T. L. R. 187.

² *Bilbee v. Hassel*, 5 T. L. R. 677; *Times* newspaper, Jan. 16, 1890.

butter and margarine merchant, had been for 35 years in the trade. H., who had been in the business but a short time, employed B. in 1879 to solicit orders, not for a salary, but at a rate of commission of $1\frac{1}{2}$ per cent. The terms of the agreement were in a letter which contained the following passage: "As regards your commission, we hereby agree to allow you $1\frac{1}{2}$ per cent. upon all orders executed by us and paid for by the customers arising from your introduction." B. continued to introduce customers down to February 1, 1888, when he was dismissed by H., who continued to do business with B.'s customers. B. sued H. for commission executed and paid for by these customers subsequent to his dismissal, and the issue was ordered to be tried whether, under the terms of the agreement, B. was entitled to commission on business done after 1888, or whether all right to future commission ceased with his dismissal. Lopes, L.J., answered the question in the affirmative, and held that B. was entitled to commission provided the order arose from his introduction, although the employment had terminated. On appeal this judgment was affirmed. *Per* Bowen, L.J.: "According to the true construction of the contract it was not necessary that B.'s remuneration should cease at the same moment as his agency determined. The measure of work done by him was to be calculated not by the work done by him, but by the fruits of that work, and these fruits might very well have occurred to H. after the determination of B.'s agency."

Where Canvasser agrees to receive Commission in Respect of his Services, he can receive Nothing when he ceases to be in Position to render such Services.—B.,¹ an advertising

¹ *Boyd v. Mathers*, 9 T. L. R. 443.

contractor, entered into an agreement with M., the owner of a newspaper called *South Africa*, in June, 1889. By the agreement B. was to act as advertising contractor and canvasser in connection with the paper, and should receive from M. a commission of 25 per cent. on contract and renewal orders for advertisements obtained by B. The parties continued to act under the agreement until November, 1890, when M. gave notice to terminate it. In December, 1890, M. sold his business to a company called South Africa, etc. Accounts had been settled between B. and M. as to the former's commission up to October 18, 1890. B. brought an action against M. to enforce a claim for commission in respect to advertisements inserted in the paper since that date, orders for which were obtained by B., and for renewals of advertisements inserted in the paper, the original orders for which were obtained by B. On May 27, 1889, B. wrote to him offering his services to represent the paper among advertisers. On May 29, M. wrote B.: "You are to get me if you can advertisements, and you are to receive a commission of 25 per cent. on initial orders. . . . What is your idea as to commission on renewal orders?" In reply to this, B. wrote, on June 10: "I shall be happy to take orders for *South Africa* upon a commission of 25 per cent.—commission payable 20 per cent. on acceptance of order, balance quarterly as accounts are paid. Renewal orders are always the same commission as initial orders. You receive the same amount for renewals as for first, and I do the same work. I never knew myself of a case in which a reduction was paid." To this M. replied on June 11: "I have yours of yesterday's date, and accept the terms of it." The main question was whether B. was entitled to commission in respect of renewals of advertisements inserted in the paper after the

termination of his employment. There was the further question whether B. could maintain any claim against the company. Kekewich, J., held that the company was under no liability to B.; and as to the claim against M., he made a declaration, "that the plaintiff is not entitled to any commission on renewal of advertisements received since the determination of the plaintiff's employment on November 7, 1890." An account was directed on this footing, and the action was dismissed with costs as against the company. Held, on appeal, that the declaration was right. *Per* Lindley, L.J.: "He could not read the letters as amounting to a contract that the plaintiff was to be paid a commission on all advertisements appearing in the paper after he had ceased to have anything to do with it. He was to be paid commission in respect of his services, and after he had ceased to be in a position to render any services he was not to receive anything. As against the company the case was hopeless."

Agreement to pay Commission does not imply a Yearly Hiring, nor to pay Commission on Renewals, without an Express and Clear Stipulation.—N.¹ was an advertisement canvasser for a number of papers. Y., the owner of the *Medical Circular*, employed N., in September, 1857, to canvass for advertisements on the terms that he was to be paid 20 per cent. commission, that "what he brought should be his own," and that he should have his renewals "as long as they continued." Wightman, J., who tried the case, took down the words, "as long as they continued," as meaning as long as the plaintiff and the defendant should continue together, and so it seemed to be taken. Y. had issued a circular mentioning N. as his

¹ *Naylor v. Yearsley*, 2 F. & F. 41.

agent. In 1858 disputes arose as to advertisements which were not paid for, and for which Y. claimed to have return of commission. In December, 1858, N. was told, by Y.'s orders, that no more advertisements would be taken from him, that he was to have no "renewal orders," and to do no further business with the paper. N. alleged that Y. continued to insert advertisements of his procuring after his dismissal. N.'s case was vested on the first count, which averred that Y., without reasonable notice, discontinued to employ N. as agent, whereby plaintiff had been deprived of "the commission and reward which he would have obtained had he been continued as such agent." N. admitted in examination that in October he had been told his advertisements would only be received "a few weeks longer." He also claimed to be paid commission on all advertisements received at any time from the customers he had originally obtained. It was submitted for defendant that there was no evidence of the contract, and that on the agreement for commission there arose no implication of an employment for any particular time. Wightman, J., who declared leave to amend by ordering a court for commission, upheld defendant's contention, and directed a non-suit.

Materials obtained by Canvasser during his Agency cannot be used, after his Dismissal, against his Principal.— E.¹ was employed as canvasser by L., who was the proprietor of the *International Guide to British and Foreign Merchants and Manufacturers*, to procure advertisements in a certain district on the Continent. E. agreed to work for L. exclusively, and L. agreed to employ E. exclusively, in that district. E. was paid a large commission, and he

¹ *Lamb v. Evans*, 93 1 Ch. D. 219.

agreed to furnish all blocks and translations relating to his canvass free of charge. The blocks, however, were generally furnished by the advertisers, and handed over for the purpose of printing the advertisements. After the termination of his agency for L., E. entered the service of the proprietor of a rival publication. L. obtained an injunction against E., restraining him from using blocks or materials obtained by E. while in L.'s employment, and for the purpose of L.'s work, for the purpose of any works other than L.'s work. It was held by Chitty, J., and by the Court of Appeal that E. was not entitled to use for the purposes of any other publication the materials which while in L.'s employment he had obtained for the purpose of his publication. *Per Lindley, L.J.*: "No case, unless it be *Reuter's Telegram Company v. Byron*,¹ can, I believe, be found which is contrary to the general principle upon which this injunction is framed, viz., that an agent has no right to employ as against his principal materials which that agent has obtained only for his principal and in the course of his agency. They are the property of the principal. The principal has, in my judgment, such an interest in them as entitles him to restrain the agent from the use of them, except for the purpose for which they were got. It is said that *Reuter's Telegram Company v. Byron*¹ is opposed to this. If that case went on the ground that the Master of the Rolls was not satisfied that the case was plain enough for him to grant an interlocutory injunction, there is nothing more to be said about it; but if the decision goes further than that, I think that undoubtedly the principle was applied there more narrowly than it ought to have been."

¹ 43 L. J. Ch. 661.

CHAPTER IX

TRADE MARKS

THE Trade Marks Act of 1905 (5 Edw. VII. c. 15), consolidating and amending the previous statutes of 1875, 1883, and 1888, opens the door of registration to a large number of trade marks which were refused registration under the old Acts. In the vain endeavour to arrive at a satisfactory definition of a trade mark, the Legislature from time to time passed Acts of Parliament which merely increased the characteristics of trade marks, and excluded all marks which did not pertain to the classes set out. The result was that a large number of marks were either refused registration or never re-entered for registration, merely because the marks were sufficiently original to stand outside the classification in which the characteristics of a trade mark were embodied. The Act of 1883 laid down three "essential particulars" of a trade mark—*i.e.* no mark was allowed to be registered unless it contained one of the three particulars. The Act of 1888 extended the number of essential particulars from three to five classes. Marks which were perfectly good trade marks were refused registration on the ground that they did not contain one of these essential particulars. The obstacles against which traders and advertisers complained, and which led to the passing of the Act of 1905, can be traced to the difficulty of hitting upon a good definition of a trade mark, and giving such definition

a statutory expression. The most descriptive definition of a trade mark is not found in the language of any Act of Parliament, but in the judgment of Lord Westbury in the case of *Leather Cloth Co. v. the American Leather Cloth Co.*¹ A trade mark, he said, is some symbol consisting in general of a picture, label, word, or words, which is applied or attached to a trader's goods, so as to distinguish them from the similar goods of other traders, and to identify them as his goods or as those of his successors in the business in which they are produced or put forward for sale. Later on, when Parliament came to give a statutory definition to a trade mark, an attempt was made to extract the essence of Lord Westbury's famous definition, and set it out in precise language. The Act of 1883 enacted that a trade mark must consist of one of the following three essential particulars: (1) The name of an individual or firm, printed, impressed, or woven in some particular or distinctive manner; (2) the written signature or copy of a written signature of the individual or his firm applying for registration thereof as trade mark; (3) a distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use. Then arose a good deal of litigation over what was "a fancy word or words not in common use." It was said the more extraordinary and extravagant the name adopted by way of trade mark the better was the object attained, and the less obnoxious was the manufacturer's exclusive claim to it. Sometimes the trade mark was a word or combination of words already in common use, but which for the purpose of a trade mark was applied in a manner different from its ordinary use. For example, "Pharaoh's Serpents" was applied to a toy; "Genuine Yankee" to a soap; "Charles-oak" to stones.

¹ 4 *De Gex, Jones & Smith*, 142.

At other times, a word was taken from a dead language and applied to goods and registered as a valid trade mark; *e.g.* "Excelsior" was applied to soap and stones; "Eureka" to shirts and agricultural cornpest. An adjective denoting quality only cannot be registered; for these reasons such words as "superior" or "superfine" and "nourishing" cannot be exclusively appropriated as a trade mark. The same is the case even with a word or symbol generally so understood in the trade as to indicate quality, such as "A1." After the Act of 1875, again, geographical names were not allowed to be registered as "marks," such as "Ethiopian stockings" or "Persian gloves," although no one ever imagined that the stockings came from Ethiopia or the gloves from Persia. As regards words "not in common use," the Act of 1888 attempted to solve the difficulty by substituting the following phrase: "or invented word or words having no reference to character or quality of the goods, and not being a geographical name." Thus the word "washerine," as applied to a soap, was excluded as obviously descriptive; and for a long time "Solio," as applied to photographic material, was held to be unregistrable, till the House of Lords decided that the word was not derived from the "Sol" mentioned by Shakespeare in "Troilus and Cressida," but from *solium* and *solio*, the Latin and Italian words for a throne or royal seat.

Finally, the new Act, sec. 9, gives the following exhaustive definition of a trade mark:—

"A registrable trade mark must contain or consist of at least one of the following essential particulars: (1) The name of a company, individual, or firm represented in a special or particular manner; (2) the signature of the applicant for registration or some predecessor in his business; (3) an invented word or invented words; (4) a

word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname; (5) any other distinctive mark, but a name, signature, or word or words, other than such as fall within descriptions in the above paragraphs (1), (2), (3), and (4), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark: Provided always that any special or distinctive word or words, letter, numeral, or combination of letters or numerals used as a trade mark by the applicant or his predecessors in business before the thirteenth day of August, one thousand eight hundred and seventy-five, which has continued to be used (either in its original form or with additions or alterations not substantially affecting the identity of the same) down to the date of the application for registration, shall be registrable as a trade mark, under this Act. For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. In determining whether a trade is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered."

Paragraphs 1, 2, and 3 are to all intents and purposes the same as in the previous statutes, except that paragraph 2 provides for the registration of the signature of a predecessor in business. This point possesses special interest for companies interested in trade marks. The name of a company represented in a special or particular manner may now be registered. Or, if a trader's business with a popular name is taken over by a company, the signature

of that trader may be used as the trade mark of that company, in order that they may derive the fullest benefits from the connection they have so purchased. The most important paragraph in sec. 9 is the fifth, which provides that any "distinctive" mark may be registered; and this must be construed in the light of the definitions given in sec. 3:—

"In and for the purposes of this Act (unless the context otherwise requires):—A 'mark' shall include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof: A 'trade mark' shall mean a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale: 'A 'registrable trade mark' shall mean a trade mark which is capable of registration under the provisions of this Act: 'The register' shall mean the register of trade marks kept under the provisions of this Act: A 'registered trade mark' shall mean a trade mark which is actually upon the register: 'Prescribed' shall mean, in relation to proceedings before the Court, prescribed by rules of court, and in other cases, prescribed by this Act or the Rules thereunder: 'The Court' shall mean (subject to the provisions for Scotland, Ireland, and the Isle of Man) His Majesty's High Court of Justice in England" (sec. 3).

According to the wording of para. 4, words having an indirect reference to the character or quality of goods may be registered; whilst the old objection to such marks as "Ethiopian stockings" on the ground that it contained a geographical name, disappears since the word is not used in its ordinary signification. The definition of the word

“distinctive,” which has hitherto caused much litigation, is clear enough because the mark, if it is adapted to distinguish the goods of the proprietor from those of other persons, is distinctive within the meaning of the Act and capable of registration. Such well-known names as “Yorkshire Relish,” “Black and White” whisky, “BDV” tobacco, which have in the past had to rely on their common law rights, are now registrable, since the subsection appears to have been specially drafted to meet such cases. By sec. 10 colour is rendered an important factor in the determination of a trade mark, as it enacts that a trade mark may be limited in whole or in part to one or more specified colours. If and so far as a trade mark is registered without limitation of colour it shall be deemed to be registered for all colours.

A new class of trade marks is created by sec. 62, which provides for the registration of special or standardized trade marks. Such marks may be registered by any association or person “who undertakes the examination of any goods in respect of origin, material, mode of manufacture, quality, accuracy, or other characteristic, and certifies the result of such examination by mark used upon or in connection with such goods.” If the Board of Trade judge it to be to the public advantage it may permit such association or person to register such a mark, whether they be trading associations or traders or possessed of a goodwill in connection with such examination. When registered, such trade mark shall be transmissible or assignable only by permission of the Board of Trade. “Associated” trade marks, “combined” trade marks, and “series of trade marks” are dealt with in secs. 24, 25, 26, and 27. Where a trade mark so closely resembles a trade mark of the

applicant for registration already on the register for the same goods as to deceive or cause confusion if used by a person other than the applicant, it shall be registered as an associated trade mark. If the owner of such a mark claims the exclusive use of any portion of such trade mark separately, it must have all the incidents of an independent trade mark, though it will be entered on the register as an associated trade mark. A series of trade marks for the same description of goods which, while resembling each other in material particulars, differ in other respects may be entered as a series in one registration. Sec. 27 provides that associated trade marks are assignable only as a whole and not separately.

The essence of an infringement is that the use of the mark upon the defendant's goods is calculated to lead purchasers to buy them as being the goods of the owner of the mark. By means of registration a trader may acquire trade mark rights without actual user of the mark. Registration is *prima facie* evidence of the owner's rights, and by virtue of sec. 41 of the Act of 1905 it is, after seven years of registration, conclusive evidence of the registered proprietor's right in the exclusive user of the mark for the goods for which it is registered. Motions to rectify the registration will be of no avail unless it commits an offence against sec. 11, which restricts the registration as trade mark or part of a trade mark "any matter the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a court of justice or would be contrary to law or morality or any scandalous design." Marks placed on the register which are no longer in use, or which have been put on the register for the purpose of blocking others and without any *bona fide* intention of using the same, are dealt with in sec. 37.

Any aggrieved person may on application remove from the register trade marks registered by a proprietor or his predecessor in business on the ground that there has been no *bona fide* user of such mark during the preceding five years. Where a trade mark has not been registered and is infringed, the owner of the article sold may bring an action for damages for passing off the defendant's goods as those of the plaintiff, even if the passing off consisted of the use or imitation of the mark. But it is a condition precedent to an action for the infringement of a trade mark that the plaintiff shall be the registered proprietor of the trade mark in question at the time the writ is issued. No action can be commenced for infringing an unregistered trade mark unless it should be an old mark, *i.e.* a mark in use before the first Act of 1875, in which case it must be shown that registration has been refused. Provision is made in sec. 42 of the new Act for the issue of a certificate of refusal in such cases.

At the Patent Office, 25, Southampton Buildings, Chancery Lane (which is under the charge of the Comptroller-general of Patents, Designs, and Trade Marks), at Manchester (where a branch registry is established for cotton goods), at Sheffield (where another branch is established for metal goods), or at the chief post-office of any large town, an official form of application to register may be obtained, and all the applicant need do is to fill it up and address it to the Comptroller. A sixpenny pamphlet entitled "Instructions to Persons who wish to Register Trade Marks" may be obtained at the chief office. If the applicant desires he may make his application through an agent. If his application is granted, the fact is advertised in the *Trade Marks Journal*, so as to notify all who may desire, on various grounds, to oppose the registration. If

the application is refused, the Comptroller communicates that fact to the applicant, who can then apply for a hearing. Should the registration be refused or opposed and allowed there is an appeal to the Chancery Court or, with the consent of the parties, to the Board of Trade. Formerly, the appeal to the Chancery was alternative to the appeal to the Board of Trade, and subject to the consent of the parties, and the motion was supported by evidence on affidavit. Under the new Act an important departure is made from the former practice on appeal. Under sec. 49, *vivâ voce* evidence may be taken in lieu of or in addition to evidence by declaration, though this can only be done by consent of both parties. By sec. 14 the former absence of power to award costs in cases of opposition is rectified, and the registrar, or in case of appeal the Board of Trade, have power to award the successful party such costs as they may consider reasonable. Moreover, by subsec. 11 of sec. 14, if a party giving notice of opposition or of appeal neither resides nor carries on business in the United Kingdom, the tribunal may require such party to give security for costs of the proceedings before it, relative to such opposition or appeal, and in default of such security being duly given may treat the opposition or appeal as abandoned. If a trade mark contains parts not separately registered as trade marks, or if it contains matter common to the trade or otherwise of a non-distinctive character, the proprietor shall, when requested by the Board of Trade or the court, disclaim any right to the exclusive use of any parts of such trade mark to the exclusive use of which they hold him not to be entitled. It is clearly provided in sec. 15 that the disclaimer is made only for the purpose of the registration, and shall not interfere with any other rights of the proprietor, and in

any event such disclaimer is only for the purpose of defining the rights of the proprietor under such registration. Actions for the infringement of a trade mark may be brought either on the equity or the common law side ; in the case of marks registered at Manchester, the action may be brought in the Palatine Chancery Court of Lancaster. If the damages claimed do not exceed the county court limit, the action may be brought there. If a foreigner commits an infringement, and is within the jurisdiction of the court, he may sue or be sued. Where several persons claim to be the proprietor of the same trade mark, or of nearly identical trade marks in respect of the same goods or description of goods, and to be registered as such proprietor, the registrar may refuse to register any of them till their rights have been determined by the court, or have been settled by agreement in a manner approved by him, or on appeal by the Board of Trade. In case of honest concurrent user, or of other special circumstances which, in the opinion of the court, make it proper so to do, the court may permit the registration of the same trade mark, or of nearly identical trade marks for the same goods, subject to such conditions as to mode or place of user, as it may think it right to impose.

In the statutory rules and order, dated March 24, 1906, issued by the Board of Trade to regulate the operation of the new Act, drastic powers are conferred on the registrar for checking any abuses on the part of traders in the selection of trade names. Rule 11 empowers him to refuse any application for the registration of trade marks upon which the following appear: (a) The words "Patent," "Patented," or "By Royal Letters Patent," "Registered," "Registered Design," "Copyright," "Entered at Stationers' Hall," "To Counterfeit this is Forgery," or

words to like effect. (b) Representations of their Majesties or of any member of the Royal Family.

Sec. 68 of the Act prohibits the unauthorized assumption of the Royal Arms in these words: "If any person, without the authority of His Majesty, uses in connection with any trade, business, calling, or profession, the Royal Arms (or arms so closely resembling the same as to be calculated to deceive) in such manner as to be calculated to lead to the belief that he is duly authorized so to use the Royal Arms, or if any person, without the authority of His Majesty, or of a member of the Royal Family, uses in connection with any trade, business, calling, or profession any device, emblem, or title in such manner as to be calculated to lead to the belief that he is employed by or supplies goods to His Majesty or such member of the Royal Family, he may, at the suit of any person who is authorized to use such arms or such device, emblem, or title, or is authorized by the Lord Chamberlain to take proceedings in that behalf, be restrained by injunction or interdict from continuing so to use the same: Provided that nothing in this section shall be construed as affecting the right, if any, of the proprietor of a trade mark containing any such arms, device, emblem, or title to continue to use such trade mark."

To the language of the section must also be added the wording of Rule 12, which prohibits the unauthorized use of national emblems in the following terms:—"Representations of the Royal Arms or Royal crests, or arms or crests so nearly resembling them so as to lead to mistake, or of British Royal crowns, or of the British national flags, or the word Royal or any other words, letters, or devices calculated to lead persons to think that the applicant has Royal patronage or authorization, may not

appear on trade marks the registration of which is applied for. Provided always that nothing contained in this rule shall preclude the registrar from allowing the registration as an 'old mark,' that is as a mark which was used by the applicant or his predecessors in business before the 13th August, 1875, of any mark which was capable of being so registered before the Trade Marks Act, 1905, came into operation."

Where representations of the arms of a foreign State or place appear on a mark the registrar may call for such justification as he may deem necessary for their use. Where a representation of the arms or emblems of any city, borough, town, place, society, body corporate, or institution appears on a mark, the applicant shall, if so required, furnish the Registrar with a consent from such official as the Registrar may consider entitled to give consent to the use of such arms or emblems. Where the names or representations of living persons appear on a trade mark, the registrar shall if he so require be furnished with consents from such persons before proceeding to register the mark. In the case of persons recently dead the registrar may call for consents from their legal representatives before proceeding with registration of a trade mark on which their names or representations appear.

CHAPTER X

ILLEGAL ADVERTISEMENTS

STATUTORY restrictions of various kinds control the publication of a certain class of advertisements. The betting and lottery advertisements prohibited by statute have been already dealt with.

Election Advertisements. — A number of statutory offences, created by the Corrupt and Illegal Practices Act, 1883, and the Amending Act of 1895, and other Acts regulating parliamentary and other elections, may be committed in advertisements. One of the most serious is the offence created by 46 & 47 Vict. c. 51, sec. 9, subsec. 2, of publishing in an election a false statement of the withdrawal of a candidate for the purpose of promoting the election of another candidate. By 47 & 48 Vict. 70, the Municipal Election (Corrupt and Illegal Practices) Act, 1884, the provision was extended to municipal elections, to elections of members of local boards, improvement commissioners, poor law guardians, and school boards. A further extension of the provision to county council elections was made by 51 & 52 Vict. c. 41; and to parish and district council, London vestry, and boards of guardians elections, by 56 & 57 Vict. c. 73. Another illegal practice which may be committed in advertisement is created by the Amending Act of 1895, 58 & 59 Vict. c. 40, concerning the publication

of a false statement of fact in relation to the personal character or conduct of a candidate. The section runs in these terms:—

- “1. Any person who, or the directors of any body or association corporate which before or during any parliamentary election, shall, for the purpose of affecting the return of any candidate at such election, make or publish any false statement of fact in relation to the personal character or conduct of such candidate shall be guilty of an illegal practice within the meaning of the provisions of the Corrupt and Illegal Practices Prevention Act, 1883, and shall be subject to all the penalties for and consequences of committing an illegal practice in the said Act mentioned, and the said Act shall be taken to be amended as if the illegal practice defined by this Act had been contained therein.
- “2. No person shall be deemed to be guilty of such illegal practice if he can show that he had reasonable grounds for believing and did believe the statement made by him to be true.
- “3. Any person who shall make or publish any false statement of fact as aforesaid may be restrained by interim or perpetual injunction by the High Court of Justice from any repetition of such false statement or any false statement of a similar character in relation to such candidate, and for the purposes of granting an interim injunction *prima facie* proof of the falsity of the statement shall be sufficient.
- “4. A candidate shall not be liable nor shall be subject to any incapacity nor shall his election be avoided

for any illegal practice under this Act committed by his agent other than his election agent, unless it can be shown that the candidate or his election agent has authorized or consented to the committing of such illegal practice by such other agent, or has paid for the circulation of the false statement constituting the illegal practice, or unless upon the hearing of an election petition the election court shall find the report that the election of such candidate was procured or materially assisted in consequence of the making or publishing of such false statements."

The penalty is provided in sec. 16 of the Acts of 1883, which enacts that a person guilty of an illegal practice shall, on summary conviction, be liable to a fine not exceeding one hundred pounds, and "be incapable during a period of five years from the date of his conviction of being registered as an elector or voting at any election (whether it be a parliamentary election or an election for a public office within the meaning of this Act), held for or within the county or borough in which the illegal practice has been committed."

Another class of offences which may be created in an advertisement is created by the Act of 1884, sec. 18 of which runs thus:—

"Every bill, placard, or poster having reference to an election shall bear upon the face thereof the name and address of the printer and publisher thereof; and any person printing, publishing, or posting, or causing to be printed, published, or posted, any such bill, placard, or poster, as aforesaid, which fails to bear upon the face thereof the name and address of the printer and publisher, shall, if he

is the candidate or the election agent of the candidate, be guilty of an illegal practice, and if he is not the candidate or the election agent of a candidate shall be liable, on summary conviction, to a fine not exceeding one hundred pounds."

Relief from the penalties is afforded by sec. 20 of the Corrupt and Illegal Practices Act of 1883, where the act or omission of a candidate or his agent amounting to an illegal practice arises from inadvertence, or from accidental miscalculation, or from some other reasonable cause of a like nature. Sec. 20 of the Municipal Elections (Corrupt and Illegal Practice) Act of 1884 is to the same effect. In *ex Parte Clarke and Others*¹ four candidates who had issued posters at a municipal election without the name and address of the printer and publisher were excused from the consequence of their action on the ground of inadvertence. But Grove, J., declared: "It must not be taken as a precedent because there is a mistake or inadvertence in this case such shall always be so treated in the future. I should be inclined to take a stricter view of these inadvertences when the Act shall become better known."

Obscene Advertisements.—By 52 & 53 Vict. c. 18, the Indecent Advertisements Act of 1889, the affixing or inscribing of indecent or obscene pictures, or printed or written matter to anything visible in the public highway is rendered an offence punishable summarily. Sec. 3 creates the offence in the following words:—

"Whoever affixes to or inscribes on any house, building, wall, hoarding, gate, fence, pillar, post, board, tree,

¹ 52 L. T. 260.

or any other thing whatsoever so as to be visible to a person being in or passing along any street, public highway, or footpath, and whoever affixes to or inscribes on any public urinal, or delivers or attempts to deliver, or exhibits to any inhabitant or to any person being in or passing along any street, public highway, or footpath, or throws down the area of any house, or exhibits to public view in the window of any house or shop, any picture, or printed or written matter, which is of an indecent or obscene nature, shall, on summary conviction, in manner provided by the Summary Jurisdiction Acts, be liable to a penalty not exceeding forty shillings, or in the discretion of the court to imprisonment for any term not exceeding one month, with or without hard labour."

Certain advertisements relating to sexual diseases are also declared in sec. 5 to be amongst such indecent advertisements as are prohibited in secs. 3 and 4.

An attempt was made in *In re Pearce*¹ to convict a newspaper under the provisions of this Act, but it was dismissed by the magistrates, and the dismissal was affirmed by the Queen's Bench Division.

Betting and Money-lending Advertisements addressed to Infants.—Under the Betting and Loans (Infants) Act of 1892 (55 & 56 Vict. c. 4), the sending of an advertisement to a person under twenty-one, inviting such person to bet, is made a misdemeanour, punishable by three months' hard labour and to a fine of £100. Sec. 1 creating the offence runs as follows:—

¹ *Times*, March 26, 1890.

- “(1) If any one for the purpose of earning commission, reward, or other profit sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites, or may be reasonably implied to invite, the person receiving it to make any bet or wager, or to enter into or take any share or interest in any betting or wagering transaction, or to apply to any person or at any place with a view to obtaining information or advice for the purpose of any bet or wager, or for information as to any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on, he shall be guilty of a misdemeanour, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine. (2) If any such circular, notice, advertisement, letter, telegram, or other document as in this section mentioned names or refers to any one as a person to whom any payment may be made, or from whom information may be obtained for the purpose of or in relation to betting or wagering, the person so named or referred to shall be deemed to have sent, or caused to be sent, such document as aforesaid, unless he proves that he had not consented to be so named, and that he

was not in any way a party to and was wholly ignorant of the sending of such document."

Sec. 2 of the Act renders the sending of an advertisement to a person inviting such person to borrow money punishable in the same way. Where the circular or advertisement is addressed to a person at any university, college, school, or other place of education, and such is an infant, knowledge of the person's infancy on the part of the offender is presumed.

Advertisements of Stolen Property.—Sec. 102 of the Larceny Act of 1861, 24 & 25 Vict. c. 96, deals with advertisements of a certain description. Advertisements offering a reward for stolen or lost property are rendered illegal where they purport that no questions will be asked, or that no attempt will be made to seize or make inquiry after the person producing the property, or where they offer to repay money to the pawnbroker, or the person with whom the property may have been pledged. The section runs thus:—

"Whosoever shall publicly advertise a reward for the return of any property whatsoever which shall have been stolen or lost, and shall in such advertisements use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost,

the money so paid or advanced, or any other sum of money or reward, for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of fifty pounds for every such offence to any person who will sue for the same by action of debt, to be recovered with full costs of suit."

By sec. 2 the term "newspaper" means a newspaper as defined for the purposes of the Acts for the time being in force relating to the carriage of newspapers by post. Under sec. 3 all actions against printers or publishers of a newspaper to recover the forfeiture provided for in the Act of 1861 must be brought within six months after the forfeiture is incurred, and with the assent in writing of the Attorney-General or Solicitor-General.

Advertisements in London Vehicles.—Certain advertisements are prohibited by the Hackney and Stage Carriages (London) Act of 1853, secs. 15 and 16:—

"15. It shall not be lawful for the proprietor of any metropolitan stage or hackney carriage to suffer any notice, advertisement, or printed bill, or any names, letters, or numbers, to appear upon the outside of any such carriage, in such a manner as to obstruct the light or ventilation of such carriage, or on the inside of any such carriage, in such position that any such notice, advertisement, or printed bill shall obstruct the light or ventilation of such carriage, or cause annoyance to any passenger therein.

"16. It shall not be lawful for any person to carry about on any carriage, or on horseback, or on foot, in any thoroughfare or public place, within the

limits of the Act, to the obstruction or annoyance of the inhabitants or passengers, any picture, placard, notice, or advertisement, whether written, printed, or painted upon, or posted or attached to any part of such carriage, or on any board or otherwise."

Miscellaneous.—Where prompt personal service of any writ or other document of which personal service is required cannot be effected, the court or judge may make an order for the substitution of service by advertisement or otherwise. The application must be made by affidavit, showing that all reasonable efforts have been made to effect personal service, that prompt personal service is impossible, and that there is a reasonable probability of the advertisement coming to the knowledge of the party to be served. Substituted service by advertisement is allowed in similar circumstances in the county court where personal service cannot be effected. Where an executor had issued advertisements for creditors under 22 & 23 Vict. c. 35, s. 29, no necessity was held to exist for similar advertisements in an administration suit.¹ Under the bankruptcy rules, provision is made for the advertisement of the receiving order, etc., but pending the hearing of an application for the rescission of the order, the court may order a stay of the advertisement to enable the debtor to obtain the assent of his creditors.²

By sec. 2 of Lord Campbell's Act (6 & 7 Vict. c. 96), it is a defence to an action for libel contained in any public newspaper or other periodical publication for the defendant to plead and prove that the libel was inserted

¹ *Cuthbert v. Warmby*, 4 W. N. 12.

² *Ex parte Carr*, 35 W. R. 150.

“without malice and without gross negligence,” and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel. But such apology must not be hidden away among the advertisements.¹

Under Section 306 of the Public Health Act of 1875 (38 & 39 Vict. c. 55) any person who destroys, pulls down, or defaces any advertisement placard bill put up with the authority of the corporation of a municipal borough is liable on summary conviction to a penalty not exceeding £5.

¹ *Lafone v. Smith*, 3 H. & N. 735.



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